Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), should be expanded, in a manner that conflicts with decisions of this Court and of the lower courts, to eliminate full First Amendment protection for concededly truthful lists of selected names, addresses, and other information regarding consumers based on the theory that such speech by its nature does not relate to matters of "public concern."

2. Whether an administrative ban on speech can satisfy intermediate First Amendment scrutiny in the absence of any evidence that it is narrowly tailored to an important governmental interest, based solely on judicial speculation that "Congress apparently believe[d]" the action taken by the agency was warranted.

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the parties to the proceeding in the court of appeals were:

Trans Union LLC
Federal Trade Commission

The parties before the Federal Trade Commission were:

Trans Union LLC
Federal Trade Commission

RULE 29.6 STATEMENT

Trans Union LLC is a limited liability company organized under the laws of the State of Delaware. Trans Union Corporation became Trans Union LLC on December 31, 1998. Trans Union does not have any parent companies or subsidiaries that have issued shares or debt securities to the public. Trans Union LLC has an affiliate, Union Tank Car Co., which has issued debt securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Trans Union LLC ("Trans Union") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 245 F.3d 809. The opinion on rehearing is reported at 267 F.3d 1138 (Pet. App.16a-23a). The decision of the Federal Trade Commission (Pet. App. 25a-64a) is reported at 2000 FTC LEXIS 23.

JURISDICTION

The court of appeals issued its decision on April 13, 2001. Trans Union's timely petition for rehearing was denied on October 23, 2001. Pet. App. 16a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The relevant portions of the Fair Credit Reporting Act are reprinted in the Appendix. Pet. App. 68a-79a.

STATEMENT

This case involves a decision by the Federal Trade Commission (FTC) banning speech by petitioner Trans Union. The speech takes the form of lists of selected names, addresses, and other information communicated by Trans Union to a wide variety of organizations, including for-profit companies, political groups, and charitable entities, which in turn use that information to offer goods or services to, or to solicit charitable and political

contributions from, people included on those lists. For example, Trans Union and its affiliates have provided lists to the National Republican Committee so that the RNC might solicit citizens to make campaign contributions (A0841-46, A2376-77);[1] to Aetna Insurance and Prudential Insurance so that they might invite persons aged 65 or older to apply for health insurance (A2375-76); to the United Way so that it might solicit individuals to make donations (A2376); and to American Tourister to enable it to send consumers discount coupons (A1992-A2003, A2378).

The D.C. Circuit held that Trans Union's speech could be prohibited because it "relates to no matter of public concern." Pet. App. 13a. Further, the court held that the prohibition was narrowly tailored to protect consumer privacy because "Congress apparently believe[d]" it was warranted. *Id.* at 22a. The decision below presents significant First Amendment questions in the increasingly important context of privacy rights. This Court's review is urgently needed.

1. Statutory Background.

The Fair Credit Reporting Act ("FCRA" or "Act") regulates the circumstances under which a credit reporting agency such as Trans Union may disclose a "consumer report" – the statutory term for information commonly referred to as a credit report. *See TRW, Inc. v. Andrews*, 122 S. Ct. 441, 444-45 (2001). Section 603(d) of the FCRA defines a "consumer report" as "[a]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's

[1] Citations to "A.___" refer to the appendix in the court of appeals. Citations to "Tr. __" refer to the transcript before the FTC. Citations to "TU-__" refer to Trans Union's exhibits before the FTC.

eligibility for . . . credit or insurance . . . [or] employment." 15 U.S.C. § 1681a(d). Section 603(f) provides a corresponding definition of "consumer reporting agency." *Id.* at § 1681a(f). Section 604 of the FCRA allows the disclosure of consumer reports for certain "permissible purposes," such as employment decisions, determinations of license eligibility, risk assessments for existing credit obligations, or other legitimate business needs. *Id.* at § 1681b. Section 607 of the Act requires credit reporting agencies to maintain procedures to ensure that they furnish consumer reports only for the purposes set forth in Section 604. *Id.* at § 1681e(a).

Congress expressly acknowledged the "vital role" of credit reporting agencies "in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1) and (3). The FCRA Committee Report also cited the "vital role" of credit reporting agencies in the economy. S. Rep. No. 91-517, at 2 (1969).

Beginning in the 1970s, the FTC began to allow credit reporting agencies to engage in target marketing as a "business transaction" with a consumer and required certification that every person on a target marketing list "will be the subject of an offer to enter into the particular business relationship involved." 16 C.F.R. § 600.5(d) (1974-1900). Not until 1990 did the FTC narrow such target marketing to offers of credit. 16 C.F.R. § 600, App. § 603 (1990).

The only FTC findings with respect to potential harm to consumers from target marketing appear in a 1990 Commentary issued by the Commission. In a preamble to that Commentary, the FTC found that the harms to consumers from credit target marketing were "insignificant" and that any privacy invasion was "modest." 55 Fed. Reg. 18804 n.14 (II, IV) (May 4, 1990).

In 1996, Congress adopted amendments to the FCRA allowing the disclosure of consumer reports for target marketing

for credit and insurance ("prescreening"). Section 1681b(c) provides that a consumer reporting agency may furnish a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer if "the transaction consists of a firm offer of credit or insurance." 15 U.S.C. § 1681b(c)(1)(B)(i). The FCRA further provides that a consumer may elect to opt out of credit and insurance target marketing. *Id.* at §§ 1681b(e), 1681m(d)(1).

2. Trans Union's Target Marketing.

Trans Union is one of three major credit reporting agencies in the United States. It engages in three different activities: (i) traditional credit reporting; (ii) permitted target marketing in the form of credit and insurance prescreening; and (iii) other forms of target marketing, using a subset of the information in Trans Union's credit database as well as purchased information ("target marketing").

Both prescreening and other kinds of target marketing involve the communication of lists of consumer names and addresses having certain characteristics. Prescreening is designed to identify consumers who qualify for a particular credit or insurance offer and consequently involves the analysis and disclosure of credit performance information. Target marketing is designed to identify a group or market of consumers who may be interested in an offer. It does not involve the examination or disclosure of credit performance information. For example, in the prescreening context, a Trans Union client interested in making a "firm" offer for a home equity loan would receive a list of homeowners meeting specific credit performance criteria, together with summaries of their individual credit performance. A target marketing client offering home furnishings would obtain a list of consumer names and addresses who are homeowners (identified by the fact that they have a mortgage), with no summary of credit performance. Trans Union excludes from both lists any consumer who has elected to opt out of credit and

insurance prescreening.

Target marketing has enormous economic implications. The total gross annual revenue of the approximately 15,000 companies supplying direct marketing lists is approximately $1.5 billion. (Tr. 3320-21, 337). The national sales revenue generated by direct marketing to consumers was $640 billion in 1996 and $684.6 billion in 1997, representing 11.7% and 11.9%, respectively, of total U.S. consumer sales. (A2020-A2202, A2682-86). In a 1996 Equifax/Harris Consumer Privacy Survey supervised by Dr. Alan Westin, 58% of the consumers surveyed responded that they or someone in their household had purchased something from a mailing they had received. (TU-88; Tr. 3606, 3656-65). Such figures do not include charitable and political contributions made on the basis of target marketing. Over 13.2 million workers were employed in 1996 and 1997 as a result of consumer direct marketing. (TU-202).

3. *Trans Union I.*

On December 15, 1992, the FTC filed an administrative complaint against Trans Union, asserting violations of §§ 604 and 607 of the FCRA. *In re Trans Union Corporation*, 116 F.T.C. 1334 (1993). The FTC alleged that Trans Union's target marketing lists qualified as "consumer reports" within the meaning of the statute.

On September 28, 1994, the FTC entered summary judgment against Trans Union. The FTC ordered it to "cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists" in violation of the FCRA. *In re Trans Union Corporation*, 118 F.T.C. 821, 869-70 (1994). Trans Union contested the FTC's determination and sought review in the D.C. Circuit.

On April 19, 1996, the court of appeals vacated the FTC's order and remanded the case for a full hearing on the merits before the FTC. *Trans Union I*, 81 F.3d 228 (D.C. Cir. 1996).

The D.C. Circuit expressed "serious doubt" about whether Trans Union's target marketing lists qualified as "consumer reports" and opined that Trans Union "raises a serious First Amendment claim with respect to the Act's application." *Id.* at 235.

4. The Hearing Before the FTC On Remand.

On remand, the FTC conducted a hearing before an administrative law judge in 1998. The judge found against Trans Union, but uncontradicted evidence made clear that Trans Union's target marketing lists are not "consumer reports" within the meaning of the FCRA because the data contained in those lists are used to identify potential markets for goods and services and are not used as factors in establishing a particular customer's eligibility for credit. Instead, credit eligibility is determined according to credit payment history. *E.g.*, A4185-86, 4200-01, 4351-53.

Moreover, the evidence was uncontradicted that the threat to privacy from target marketing is significantly less than that from prescreening, which is authorized under the FCRA. Prescreening involves the use of detailed credit performance information – revealing, for example, how a given consumer pays her bills and whether she pays them on time – to select individuals for offers of credit or insurance. The FTC has nonetheless concluded that, in prescreening, "there is relatively insignificant harm to the consumer because the privacy infringement is minimal" and that any "invasion of the consumer's privacy" is "modest" when "his or her credit record is reviewed in the prescreening process." 55 Fed. Reg. 18804, 18807 & n.14 (II 4) (May 4, 1990).

The evidence showed that credit providers made approximately 1.8 *billion* credit prescreening offers to credit-qualified American consumers in 1997. (TU-184, Tr. 2176-2178). Thus, in one year alone, credit reporting agencies disclosed to credit and insurance providers detailed financial information regarding the majority of the adult population in the United States. Against this background of pervasive

prescreening, the computerized disclosure of manifestly *less* invasive (and often public-record) information in connection with other forms of target marketing – *e.g.*, that a consumer has a mortgage or a bank card – seems hardly noticeable in terms of consumer privacy.

The evidence also established that prescreening cannot be deemed more socially valuable than other forms of target marketing. Only about 1 to 2 percent of consumers who receive prescreening offers respond to them. Tr. 538-539, 619, 728, 2375-2376, 3173. Further, a prescreening offer is not a guarantee; it is subject to the terms in the offer and to post-offer review by the credit or insurance company. 15 U.S.C. § 1681a(l). As the ALJ found, "when a consumer responds and accepts a firm offer of credit, a credit grantor can then review the customer's credit report and deny the customer the credit offered if the consumer's credit report reflects something negative about the consumer's credit performance." As one witness explained, the prescreening offer of credit or insurance is "anything but firm. It's mush, it's not a firm offer." Tr. 2547. Only 70 to 80 percent of consumers who respond to these "firm" offers are ultimately approved. Tr. 2646-47. The undisputed evidence from the administrative hearing below – in fact, from witnesses called by the FTC itself – was that the purpose of credit prescreening is merely to switch good credit customers from one credit grantor to another. A4173-74.

The undisputed evidence showed that target marketing reduces the amount of unwanted solicitations by, for example, allowing advertisers to exclude persons who probably would not be interested in purchasing the product or service being offered, and allowing fundraisers to exclude persons without bank cards would not be readily able to contribute to a cause being promoted by phone. A2345-46, A2602-08, A4360-61. There was no evidence that target marketing causes embarrassment or humiliation. Moreover, the evidence underscored the significant benefits to consumers and our national economy from target

marketing. Tr. 3320-21, 3606, 3656-65, A2202, A2682-86, TU-88, TU-202.

5. The FTC's Decision.

Notwithstanding this record, the FTC adhered to its view that Trans Union's lists qualified as "consumer reports" and were accordingly prohibited by the FCRA. The FTC necessarily acknowledged that Trans Union's lists constitute "speech" for purposes of the First Amendment "because they communicate substantial consumer information to Trans Union's target marketer customers." Pet. App. 37a. Nonetheless, the FTC determined that "Trans Union's lists are not fully protected speech and thus we decline to apply strict constitutional scrutiny to the FCRA." *Id.* at 40a n.59. The FTC reasoned that, under *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), "the level of protection [a] Court should give to a consumer report turn[s] on whether the record concerned *public* or *private* matters." Pet. App. 39a. "'[S]peech solely in the individual interest of the speaker and its specific business audience' . . . deserve[s] reduced First Amendment protection." *Id.* (quoting plurality opinion in *Dun & Bradstreet*).

6. The Decision Below.

On a second petition for review, the D.C. Circuit upheld the FTC's determination that Trans Union's target marketing lists qualified as "consumer reports" under the FCRA, even though the information they contained was not used as a factor in determining consumers' eligibility for credit. Pet. App. 1a-15a. The court also rejected Trans Union's First Amendment objection by holding that the information "communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern." *Id.* at 13a. Accordingly, even though the lists disclosed truthful information which the court nowhere found to be embarrassing or humiliating, the D.C. Circuit held that they "warrant[ed] 'reduced constitutional protection.'" *Id.* at 13a

(quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.8 (1985)). The court brushed aside any argument that the FTC's ban on speech was content-based, even though, under the FTC's interpretation of the statute, "prescreening" speech favored by the government is allowed, while other target marketing is prohibited – so that whether speech is permitted or banned by the FTC depends on what the marketer says.

The court next held that the FTC's ban satisfied reduced, or intermediate, First Amendment scrutiny despite the FTC's failure to consider the obvious consumer opt-out alternative, a method approved by Congress for prescreening information more invasive of privacy, because the government "had no obligation to choose the least restrictive means of accomplishing its goal." *Id.* at 14a. Similarly, the court held that the prescreening exception did not demonstrate an absence of narrow tailoring, even though it results in the disclosure of significantly more invasive information about consumers. *Id.*

7. The Decision on Rehearing.

On May 25, 2001, Trans Union filed a petition for rehearing and rehearing en banc. The court ordered the FTC to file a response to the petition. Thereafter, the panel ordered the parties to file supplemental briefs "addressing the impact of *Lorillard Tobacco Co. v. Reilly*, [121 S. Ct. 2404 (2001)], on the question of whether Congress' failure to consider or adopt an opt-out scheme demonstrates that the FCRA is not sufficiently tailored to survive intermediate First Amendment scrutiny."

On October 23, 2001, the D.C. Circuit denied rehearing and rehearing en banc. The panel issued a second opinion clarifying and reaffirming its earlier decision. The D.C. Circuit held that Trans Union's speech "concern[ed] no public issue" (Pet. App. 16a) (internal quotation omitted) and was therefore governed by this Court's decision in *Dun & Bradstreet*. "Trans Union's

target marketing lists comprise speech of purely private concern." *Id.* at 17a.

On the basis of its determination that Trans Union's speech – essentially by definition – did not involve matters of public concern, the D.C. Circuit held that the otherwise content-based distinction drawn by the FTC between (1) insurance and credit prescreening, and (2) other forms of target marketing did not trigger heightened First Amendment scrutiny and was not constitutionally problematic:

> [Trans Union] argues that . . . the FCRA makes a content-based distinction deserving of strict scrutiny. The notion that content-based speech restrictions warrant strict scrutiny, however, derives from cases involving fully protected speech. Trans Union's target marketing lists are private speech warranting only qualified constitutional protection.

Pet. App. 18a-19a (citations omitted).

The D.C. Circuit also confirmed on rehearing that it deemed the narrow tailoring requirement of intermediate scrutiny to be satisfied, even though prescreening offers of credit and insurance result in the disclosure of more detailed credit information about individual consumers than does target marketing. The court of appeals conceded that the statute manifests a "differential treatment of information sold for prescreening and that sold for target marketing." Pet. App. 21a. The court did not deny that Trans Union's FTC-prohibited target marketing is far less invasive of financial privacy than is FTC-permitted prescreening. But the court of appeals held that the disparity in treatment did not demonstrate a lack of narrow tailoring for the simple reason that "Congress *apparently believes* that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Id.* at 22a (emphasis added). The D.C. Circuit made no mention of the prescreening exception for offers of *insurance* as opposed to *credit*. Nor did

it identify any *evidence* or *factual finding* to support Congress' "apparent[] belie[f]" that the disparity in treatment between prescreening and other sorts of target marketing was warranted by facts bearing on the interest in financial (or other) privacy.

REASONS FOR GRANTING THE WRIT

This case presents substantial First Amendment questions warranting this Court's review, and it presents those questions in an area – informational privacy – which is an increasingly significant legal context.

At issue is the FTC's decision to ban target marketing speech in the name of privacy, and to escape the ordinary burdens of the First Amendment by (1) denigrating the public importance of the speech involved and (2) imputing to Congress a fictional determination that is directly contrary to the findings Congress actually made. (*See* p. 26, *infra*.) Worse, the FTC squarely confronted the constitutional question by eschewing a more limited, and more plausible, construction of the applicable statute that would have recognized that Trans Union's target marketing lists do not qualify as "consumer reports" in the first place. Such an interpretation would have avoided the constitutional question. *See DeBartolo Corp. v. Florida Gulfcoast Building & Constr. Trades Council*, 485 U.S. 568, 574-77 (1988).[2]

The D.C. Circuit approved the agency's administrative charade. In so doing, the court of appeals expanded *Dun & Bradstreet* beyond all recognition and stretched a pinprick exception from normal free speech jurisprudence into a gaping hole for speech that the judiciary decides to demote to an "only private interest" status. In addition, the D.C. Circuit watered down intermediate First Amendment scrutiny into what is

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[2] The FTC expanded the FCRA's definition of "consumer report" to include all information about a consumer whether used for credit eligibility or not. Pet. App. 33a-34a. A narrower definition consistent with the FCRA would have excluded the information used by Trans Union in target marketing.

essentially rationality review, by holding that a government ban on speech may be sustained so long as a court finds that "Congress apparently believes" it is warranted. Accordingly, this Court's review is urgently needed.

A. THIS IS AN IMPORTANT CASE.

The development of extensive computer databases and the emergence of the Internet have underscored the significance of privacy rules and their relationship to the First Amendment. Personal information is increasingly captured in electronic form and thus amenable to the efficiencies of computer retrieval, search, and communication. Today's news headlines are replete with reports that privacy, especially in relation to freedom of communication, has become one of the leading issues of the Twenty-first century.[3]

Professor Alan Westin, who figured importantly in the passage of the FCRA, Pet. App. 41a, has put the issue in historical context: "If you start with the Greek city-state and run through the Middle Ages into early parliamentary institutions, and then to the American Republic, privacy remained largely unchanged by technology."[4] "But in the 1960s we reached a watershed. That was the moment computer systems began to

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[3] *See* U.S. Dep't Of Commerce, PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE (1997); Jeffrey Rosen, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA (2000); Jennifer Bresnahan, *Personalization, Privacy, and the First Amendment: A Look at the Law and Policy Behind Electronic Databases*, 5 VA. J.L. & TECH. 8 (2000); Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045 (2001); *Symposium Data Privacy Laws and the First Amendment: A Conflict?*, 11 FORDHAM I.P., MEDIA & ENT. L.J. 3 (2000); *Symposium: Privacy & the Law*, 67 GEO. WASH. L. REV. 1097 (1999); *Symposium: Cyberspace and Privacy: a New Legal Paradigm?*, 52 STAN. L. REV. 1003 (2000); *Symposium: The Unwanted Gaze, by Jeffrey Rosen*, 89 GEO. L. REV. 2013 (2001).

[4] *The Searchable Soul: Privacy in the Age of Information Technology*, HARPER'S, Jan. 2000, at 58.

arrive with large-scale databases and remote terminals. Now we're in the second modern revolution in privacy. The Internet is transforming the way people reveal themselves."[5]

This Court has already begun to confront privacy issues in the electronic age. *See, e.g., Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001) (holding that media defendants who disclosed a cell phone conversation that had been illegally intercepted by others could not be subject to civil liability under the First Amendment); *Reno v. Condon*, 528 U.S. 141 (2000) (upholding federal Driver's Privacy Protection Act of 1994, which restricts disclosure of information collected by state departments of motor vehicles); *cf. Kyllo v. United States*, 533 U.S. 27, __, 121 S. Ct. 2038, 2043 (2001) (confronting Fourth Amendment question of "what limits there are upon this power of technology to shrink the realm of guaranteed privacy").

These decisions, however, have been deliberately contextual, with holdings that have been carefully limited to the particular circumstances presented, *see Bartnicki*, 121 S. Ct. at 1764-65; *id.* at 1768 (Breyer, J., concurring), or technologies involved, *see Kyllo*, 121 S. Ct. at 2043-46, or that have addressed Congress' affirmative power without inquiring into the First Amendment limits on that authority. *See Reno*, 528 U.S. at 151. Against that backdrop, it is critical for this Court to hold that meaningful First Amendment scrutiny must be given to laws prohibiting truthful, non-embarrassing communications between willing speakers and willing audiences in order to protect a generalized interest in privacy. This Court needs to make clear, in other words, that privacy is no talisman whose mere invocation (or, indeed, genuine involvement) somehow dissolves time-honored and tradition-tested categories of First Amendment analysis. The First Amendment limits the power of government to restrict "expression, even in order to protect the privacy of other

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[5] *Id.*

individuals."[6] *See also* Eugene Volokh, *Freedom of Speech and Information Privacy*, 52 STAN. L. REV. 1049, 1122 (2000) (concluding that privacy "restrictions on speech that reveals personal information" are typically unconstitutional); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM I. P., MEDIA & ENT. L.J. 97, 152 (2000) ("Restricting companies' use of information about transactions and consumer preferences raises troublesome First Amendment issues. . . . . [C]ourts should be skeptical of privacy regulation . . . . ").

This case is the logical successor to *Los Angeles Police Dept. v. United Reporting Corp.*, 528 U.S. 32 (1999), which implicated but did not decide important questions about the relationship between privacy rights and the First Amendment. In *LAPD*, this Court granted certiorari to review a California statute that prohibited the release of arrest information for commercial purposes but permitted it for "journalistic, scholarly, political, governmental, or investigative purposes." The Ninth Circuit had held that the governmental interest in protecting the privacy of arrestees was substantial but that the exceptions to the statute precluded it from advancing the privacy interest in a direct and material way. 146 F.3d 1133 (9th Cir. 1998). A majority of this Court treated the case as one involving selective access to government information and reversed the Ninth Circuit's judgment on the ground that "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." 528 U.S. at 40. However, in a series of separate opinions, several Justices expressed keen interest in the privacy and First Amendment issues presented. Justice Scalia, joined in a concurring opinion by Justice Thomas, opined that the difference between facial and as-applied challenges was determinative and that:

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[6] Fred H. Cate, PRIVACY IN THE INFORMATION AGE 55 (Brookings 1997).

> it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information.

Id. at 42. Justice Ginsburg, joined in a concurring opinion by Justices O'Connor, Souter, and Breyer, explained that the California statute was "properly analyzed as a restriction on access to government information, not as a restriction on protected speech." *Id.* at 42. Justice Ginsburg's concurrence found it determinative that "the statute at issue does not restrict speakers from conveying information they already possess. Anyone who comes upon arrestee address information in the public domain is free to use that information as she sees fit." *Id.* Justice Stevens, joined by Justice Kennedy, would have held the California statute invalid under the First Amendment on the ground that "the denial of access is based on the fact that respondent plans to publish the information to others who, in turn, intend to use it for a commercial speech purpose that the State finds objectionable. . . . [T]he First Amendment supports the third parties' use of it for commercial speech purposes." *Id.* at 46 (dissenting opinion).

The instant case is the natural follow-on to *LAPD*. This case involves the ability of the government to prohibit the communication of information that is already within a speaker's lawful possession. Trans Union's information is its own, unlike the LAPD's arrest records. The First Amendment protects communications by Trans Union to its clients, as well as speech by those clients to consumers and the public. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979) (holding, unanimously, that freedom of speech is not lost to the speaker "who arranges to communicate privately . . . rather than to spread his views before the public" directly).

Neither the FTC nor the D.C. Circuit ever found that the information involved in target marketing was embarrassing, humiliating, or intrusive. Yet the FTC's prohibition is defined by the *content* of the information the speaker wishes to impart as well as by the communicative *uses* that the information's recipient wishes to make of it. Moreover, the line between the communications permitted and those prohibited, while drawn in the *name* of consumer privacy, in fact allows communications that manifestly entail *greater* dangers to privacy interests than those posed by the communications it *forbids*. That glaring mismatch between the prohibition and the asserted privacy interest distinguishes this case from any in which a speech ban might be narrowly tailored to protect privacy. This Court is unlikely to be presented any time soon with so suitable a vehicle for reviewing the vital interplay between privacy and the First Amendment.

This case also has enormous practical significance for Trans Union and other credit reporting agencies. Trans Union has been named as a defendant in a series of class actions brought under the FCRA, allegedly on behalf of every person in Trans Union's database – which includes some 190 million individuals, or virtually every adult in the United States.[7] Because the FCRA provides for statutory damages of between $100 and $1,000 for willful violations, *see* 15 U.S.C. § 1681n(a)(1)(A), in theory Trans Union's potential liability is some $190 *billion*. If the

[7] *See Martinelli v. Trans Union Corp.*, No. 99-1867 WHA (N.D. Cal.); *Winkelmann v. Trans Union LLC*, No. 8:99 cv 398 (D. Neb.); *Kearley v. Equifax, Inc.*, No. 00-D-225-N (M.D. Ala.); *Comstock v. Trans Union LLC*, No. CIV 00-0518 PHXMS (D. Ariz.); *Turner v. Trans Union Corp.*, No. 00-232-GPM (S.D. Ill.); *Woods v. Trans Union Corp.*, No. 00-256-WLB (S.D. Ill.); *Feige v. Trans Union Corp.*, Case No. 00-Civ-2621 (S.D.N.Y.); *Rozenblitt v. Trans Union Corp.*, No. 00-CV-1861 (E.D. Pa.); *Grogerty v. Trans Union Corp.*, No. 00-C-1665 (N.D. Ill.); *Payne v. Trans Union Corp.*, No. 00C 3292 (N.D. Ill.). These actions have been transferred to the United States District Court for the Northern District of Illinois pursuant to an August 2, 2000 Transfer Order of the Judicial Panel on Multidistrict Litigation.

D.C. Circuit's decision is given collateral estoppel effect in these class actions, as plaintiffs seek, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979) (offensive collateral estoppel), Trans Union will not even have the opportunity to re-argue its First Amendment defense before it is faced with crushing liability.

The D.C. Circuit's opinion has already been followed by a district court adjudicating related issues under the Gramm-Leach-Bliley Act, *see* 15 U.S.C. § 6802(a), (b), which imposes privacy rules on financial institutions. *See Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 40 (D.D.C. 2001), *appeal pending*, No. 01-5202 (D.C. Cir.) (applying the decision in this case to conclude that the disclosure of credit information is of "purely private concern" under *Dun & Bradstreet*). The need for this Court's review is plain.

B. THE D.C. CIRCUIT'S EXPANSION OF *DUN & BRADSTREET* TO CREATE A SUBJECTIVE CLASSIFICATION OF "PRIVATE" TRUTHFUL SPEECH SUBJECT TO DIMINISHED FIRST AMENDMENT PROTECTION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The D.C. Circuit's decision creates disturbing new First Amendment rules that conflict with decisions of this Court and with precedent in other circuits. On the basis of *Dun & Bradstreet*, the D.C. Circuit held that "Trans Union's target marketing lists comprise speech of purely private concern" and therefore do not trigger full First Amendment protection. Pet. App. 17a. The D.C. Circuit's holding warrants this Court's review because it conflicts with this Court's own decision in *Dun & Bradstreet* and would turn that case from a carefully limited exception into a First Amendment "black hole" that would swallow established principles of free speech jurisprudence.

The plurality opinion in *Dun & Bradstreet* concluded that a

false statement in a credit report on a private individual was not speech on a matter of "public concern," as that term is used in the specialized context of defamation law under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The report in *Dun & Bradstreet* of a single business bankruptcy "was made available to only five subscribers." 472 U.S. at 762. The plurality took great pains to stress that it was emphatically *rejecting* the view – erroneously embraced by the D.C. Circuit in this case – that its holding "leaves all credit reporting subject to reduced First Amendment protection." *Id.* at 762 n. 8. "We also do not hold * * * that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." *Id.*

Dun & Bradstreet therefore provides absolutely *no* basis to conclude that the speech at issue here is subject to reduced protection under the First Amendment.[8] This Court has invoked *Dun & Bradstreet* only in the defamation context of litigation between private parties, one of whom is said to have injured another's reputation by publishing a falsehood. *See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). To compare a truthful and non-embarrassing list consisting of thousands (or more) of potential consumers culled and organized according to demographic or other selection criteria of interest to innumerable potential users of such lists,

[8] *See* Volokh, 52 STAN. L. REV. at 1096 (*Dun & Bradstreet* "says little about the propriety of applying the 'private concern' test to speech that, unlike false statements of fact, is presumptively constitutionally valuable. And *Dun & Bradstreet's* reasoning confirms that the lower protection given to private-concern speech flows precisely from the speech being false and thus presumptively unprotected."); Singleton, 11 FORDHAM I. P., MEDIA & ENT. L.J. at 140 ("Any special status for matters of 'public concern' or special exemptions for the press are likely to be increasingly incoherent in the age of the Internet, which is breaking these boundaries down.").

with an allegedly defamatory credit report concerning a single person, is truly to mix not just apples and oranges, but apples and apple orchards.

Nonetheless, based on *Dun & Bradstreet*, the D.C. Circuit created a new, bright-line rule that speech of purely "private concern" is not entitled to full First Amendment protection. Pet. App. 17a, 18a, 35a. Under the D.C. Circuit's decision, this rigid rule applies as a matter of definition, regardless of the kind of information involved or its impact on privacy. This Court has charted a different constitutional course with respect to restrictions on truthful speech in the name of privacy. It has eschewed a rigid rule and has instead engaged in a contextual balancing of privacy interests and First Amendment principles, twice holding that the First Amendment prevents a state from punishing the disclosure of a rape victim's name with civil damages. *See Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975). This Court has ruled that a state may not, in the name of privacy, prohibit the press from publishing accounts of judicial misconduct commissions, *see Landmark Communications v. Virginia*, 435 U.S. 829, 837 (1978), or the names of juvenile offenders available in court records. *See Smith v. Daily Mail*, 443 U.S. 97,101-02 (1979). This Court has also invalidated attempts to protect the privacy of civil rights boycott violators by penalizing the disclosure of their names. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925-26 (1982).[9]

[9] This Court has also struck down privacy laws restricting the right of attorneys to send targeted solicitation letters to potential clients, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-77 (1988), and preventing door-to-door solicitors from approaching households that have not affirmatively invited them. *Martin v. Struthers*, 319 U.S. 141, 147-48 (1943). This Court has overturned bans on the unsolicited mailing of contraceptive ads to private homes justified on grounds of privacy. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983). *See also Frisby v. Schultz*, 487 U.S. 474, 485-88 (1988) (balancing rights of privacy and expression).

In all of these cases, this Court has consistently rejected a bright-line rule that would elevate privacy over the First Amendment. In *Florida Star*, for example, this Court opined that it has preferred to resolve the conflict between privacy and free speech "only as it ar[i]se[s] in a discrete factual context." 491 U.S. at 530. *See id.* at 530 (citing Restatement (Second) of Torts § 652D (1977)); *see also Bartnicki v. Vopper*, 531 U.S. 990 (2001). The D.C. Circuit replaced this contextual balancing with a bright-line rule that it extracted from *Dun & Bradstreet*. Yet in *Florida Star* this Court implicitly rejected the D.C. Circuit's approach, expressly "contrast[ing]" the law governing privacy restrictions on truthful speech "with the well-mapped area of defamatory falsehoods," citing *Dun & Bradstreet*. 491 U.S. at 530 n.5.

There is no conceivable basis for transplanting the exception for defamatory "private speech" to other areas of First Amendment law. The *Dun & Bradstreet* exception has vexed the lower courts and attracted much criticism even in the defamation context.[10] One observer has identified "something of a consensus among the commentators that the difficulties in developing any principled approach to the public concern test

[10] Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 266 (1987); Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 782 (1987); Andrew Jay McClury, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1082 (1995); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 668 (1990); Michael Greene, *Comment, Dun & Bradstreet v. Greenmoss: Cutting Away from the Protective Mantle of Gertz*, 37 HASTINGS L.J. 1171, 1194 (1986); David B. Katz, *Note, First Amendment – Defamation – Private Individual May Recover Presumed and Punitive Damages Without a Showing of Actual Malice*, 16 SETON HALL L. REV. 785, 806 (1986).

renders it essentially standardless."[11] Another survey of the progeny of *Dun & Bradstreet* in the lower courts has concluded that the courts' "efforts to locate a principled boundary between public and private concerns in defamation cases have not been encouraging. If not altogether devoid of content, the concept of speech addressing matters of public concern has proved sufficiently murky to give courts vast discretion in deciding whether to place a libelous statement in this category. . . . The fuzzy and mysterious line between public and private concerns thus 'appears to encourage ad hoc resolutions of the issue.' . . . These differences in classification seem to hinge more on judicial value judgments than on predictable adherence to the *Dun & Bradstreet* formula."[12]

The danger of exporting *Dun & Bradstreet* to other realms of First Amendment law is illustrated by another line of cases, not discussed by the D.C. Circuit, addressing the doctrine of "public concern" with respect to the free speech rights of government employees. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146 (1983). Although extended to government contractors in *Board of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 685 (1996), the doctrine of *Connick v. Myers* has otherwise been limited to the context of public employees. "[I]t is one thing to decide what is a matter of public concern for the purpose of protecting a government employee from discharge – where the Court must tie in the type of speech engaged in to the effective functioning of the office – and quite another thing for the Court to engage in the much more open-ended task of trying to decide what is a 'matter of public concern' . . . ." 4 Ronald Rotunda &

[11] Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 551 n.114 (1998).

[12] Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597, 609, 612, 614 (2000).

John Nowak, TREATISE ON CONSTITUTIONAL LAW § 20.35 (1992).

The D.C. Circuit's decision itself demonstrates the dangers involved. The court did not articulate any objective criteria for determining whether Trans Union's speech was of "private" or "public" concern. Instead, the D.C. Circuit proceeded by way of ipse dixit, not analysis. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when see it."). The D.C. Circuit did not question any of the uncontradicted record evidence establishing that target marketing is of immense public importance – that millions of consumers make purchasing decisions based on target marketing; that a substantial portion of the U.S. economy is based on the availability of this information; and that the target marketing lists communicate information (such as mortgages) much of which is in the public domain. Even the FTC acknowledged that target marketing provides "substantial benefits for American consumers," Pet. App. 25a, and the FTC ALJ found that target marketing lists "serv[e] as a vital part of the process to 'inform the public of the availability, nature, and prices of products and services,' and perform[] 'an indispensable role in the allocation of resources in a free enterprise system.'" *Id.* at 66a (citations omitted). "Target marketing lists are as much a part of the process of speech as loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); public sidewalks, *United States v. Grace*, 461 U.S. 171 (1983); or free standing newsracks used to distribute free magazines, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)." *Id.* If the First Amendment's protections extend to such quotidian matters as entertainment, *Winters v. New York*, 333 U.S. 507, 510 (1948), reviews of stereo systems, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 498-501 (1984), and sophomoric parodies, *Hustler v. Falwell*, 485 U.S. 46, 55 (1988), they certainly cover the speech at issue here.[13]

[13] Federal Reserve Board Chairman Alan Greenspan has explained that "information on the characteristics of customers * * * has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services" and is "essential to the functioning of an advanced information based economy such as ours." Quoted in Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877, 883 (2000). Other commentators have observed that such information constitutes part of this nation's "essential infrastructure," the benefits of which are "so numerous and diverse that they impact virtually every facet of American life." Fred H. Cate & Richard J. Varn, THE PUBLIC RECORD: INFORMATION PRIVACY AND ACCESS – A NEW FRAMEWORK FOR FINDING THE BALANCE 10 (1999), available at <http://www.cspra.org/The%20Public%20Record.pdf>.

According to the D.C. Circuit, a speaker who does not directly communicate with consumers, but rather supplies raw informational material to others (such as a wire service that supplies news stories to media outlets), may find itself stripped of First Amendment rights. A newspaper might be prohibited from listing the names of persons who recently bought and sold houses in a particular area, or who recently worked for a particular employer. The D.C. Circuit's decision undermines the right to communicate not just information in credit card and mail order catalog databases but also names and addresses in per nal Rolodex files and e-mail address books. The potential effects of the decision below are as staggering as they are unanalyzed by the D.C. Circuit.

Moreover, the D.C. Circuit's decision conflicts with precedent in other circuits, which have properly limited *Dun & Bradstreet* to the special context of defamatory falsehoods.[14] In

[14] *See, e.g., Flamm v. American Assn. of University Women*, 201 F.3d 144, 147, 150 (2d Cir. 2000); *Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999); *Levinsky's, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 128 (1st Cir. 1997); *Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 363 (8th Cir. 1996); *Innes v. Howell Corp.*, 76 F.3d 702, 709 (6th Cir. 1996); *Jean v. Dugan*, 20 F.3d 255, 262 n.6 (7th Cir. 1994); *Snead v. Redland Aggregates*, 998 F.2d 1325, 1328, 1333 (5th Cir. 1993); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1087 (7th Cir. 1990); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914,

fact, the D.C. Circuit was unable to cite *any* case from *any other court* applying *Dun & Bradstreet* in the surprising manner pioneered by the court below.

A number of courts have squarely rejected the reasoning of the D.C. Circuit. In *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981), for example, the court held that a statutory prohibition of use or disclosure of certain types of truthful information in credit reporting business was invalid because it "puts a direct content-based restraint on speech." *Id.* at 196. The court rejected the argument that the prohibition on speech could be sustained as a time, place, or manner regulation, because "[a] 'constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" *Id.* at 197 (quoting *Consolidated Edison of New York v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980)).

In *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228 (Cal. 2d Dist. 1995), *review denied*, 1995 Cal. LEXIS 5075 (Cal. 1995), *cert. denied*, 516 U.S. 1074 (1996), the court invalidated a statute that prohibited disclosure by a credit reporting agency of an unlawful detainer regarding a prospective tenant. The court held that credit reports are fully protected speech under the First Amendment rather than lesser-protected commercial speech: "The fact that [the credit reporting agency] sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech. 'Some of our most valued forms of fully protected speech are uttered for a profit.'" *Id.* at 230. The court found *Dun & Bradstreet* inapplicable because the speech

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928 (3rd Cir. 1990); *Polson v. Davis*, 895 F.2d 705, 708 (10th Cir. 1990); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1195 (9th Cir. 1989); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 686 (4th Cir. 1989); *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 362 (11th Cir. 1987); *McDowell v. Paiewonsky*, 769 F.2d 942, 948 n.6 (3rd Cir. 1985).

involved was truthful rather than false. *Id.* at 230 n.1. "The view that credit reports involve a matter of only private concern is expressed in various ways in the plurality opinion in *Dun & Bradstreet*, a defamation case arising from an erroneous credit report of a bankruptcy filing. While the distinction may be significant in the area of defamation, it does not define the parameters of permissible regulation for truthful reporting." *Id.* at 232.

Yet, in the decision below, the D.C. Circuit held precisely the opposite. The conflict between the D.C. Circuit and the California courts does not exist simply "in the air." In *Joshua L. Frey, et al. v. Trans Union Corporation, Inc.*, Case No. 79 88 93 (Superior Court of the State of California, County of Orange), Trans Union is a defendant in a class action in California state court. That court will be bound by the California courts' rejection of *Dun & Bradstreet*, while the federal court class actions in which Trans Union is a defendant may follow the D.C. Circuit's decision below, as a matter of collateral estoppel or otherwise. *See* n. 7, supra. The disparity in treatment, and the consequent urgency of this Court's review, is palpable. *See also* Scott Shorr, *Note: Personal Information Contracts: How to Protect Privacy Without Violating The First Amendment*, 80 CORNELL L. REV. 1756, 1798-99 (1995) ("the circuit courts of appeal have yet to reach an agreement as to whether consumer credit reports constitute commercial speech or as to how much First Amendment protection they merit. . . . [There is] constitutional uncertainty about the status of credit reports.").

C. THE D.C. CIRCUIT'S HOLDING THAT INTERMEDIATE SCRUTINY MAY BE SATISFIED BY CONJECTURE ABOUT WHAT "CONGRESS APPARENTLY BELIEVES" CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The D.C. Circuit held that the disparity in treatment between

credit and insurance prescreening and target marketing for all other purposes did not demonstrate a lack of narrow tailoring, even though prescreening entails a *greater* invasion of consumer privacy than does the target marketing banned by the FTC. The court held that "Congress *apparently believes* that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." Pet. App. 22a (emphasis added). The D.C. Circuit cited no evidence to support this conjecture. Nor did it offer any justification for the prescreening exception for offers of *insurance* as opposed to *credit*. The D.C. Circuit's reliance on Congress' "apparent[] belie[f]" is in effect the application of mere rationality review.

The court of appeals' speculation that Congress drew a finely hewn distinction between prescreening and other forms of target marketing is not only pure fiction, it is directly contrary to Congress' actual findings. In enacting the 1996 amendments to the FCRA, Congress acknowledged that the consumer data for credit and insurance prescreening was "more sensitive information" than "lists that are not based on credit limit, credit payment history, credit balance, or negative information." S. Rep. No. 104-185, at 36 (1995). Further, Congress opined that the opt out alternative would suffice for direct marketing as well as prescreening: "By opting out, consumers can prohibit consumer reporting agencies from releasing their names or other information about their reports for prescreening *and direct marketing*." *Id.* (emphasis added).[15]

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[15] Contrary to the D.C. Circuit's assertion, Pet. App. 21a, Congress did not reject an opt-out scheme for target marketing. In 1996, Congress considered an amendment to the FCRA allowing a credit reporting agency to disclose, for target marketing purposes, information which did not rise to the level of a consumer report. In Conference Committee, this provision was deleted from the final bill, but the legislative history reveals that Congress intended no inference to be drawn from the deletion. *See* 142 Cong. Rec. 11926 (Sept. 30, 1996) ("The deletion leaves the law silent on this issue retaining the status quo. The House action does not reflect any Congressional intent regarding the extent to which direct marketing is permissible under the FCRA") (Sen. Bryan). In any event, a congressional decision not to enact a particular measure is a " a particularly dangerous ground" for judicial interpretation. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675, 681 (2001).

Nor did the FTC adduce any supportive evidence in the administrative record. The FTC never found that target marketing involved embarrassing or humiliating information. In fact, the FTC has characterized as "insignificant" and "modest" the potential privacy invasion from prescreening, 55 Fed. Reg. 18804 n. 14 (II, 4) (May 4, 1990), even though it may entail the disclosure of far more detailed credit performance information than other forms of target marketing.

In concluding that the internal inconsistency of the FTC's ban called for no evidentiary explanation under intermediate scrutiny, the D.C. Circuit placed itself in conflict with decisions of this Court holding that "exemptions and inconsistencies bring into question" whether a challenged law – even one restricting only commercial speech – directly and materially advances the asserted governmental interest. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). A restriction on speech is invalid under intermediate scrutiny when it "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broadcasting Assn. v. United States*, 527 U.S. 173, 195 (1999).

The D.C. Circuit sought to avoid this First Amendment principle by speculating that "Congress apparently believe[d]" there was a relevant empirical distinction between the types of speech involved and between the corresponding consumer preferences. This ruling by the D.C. Circuit not only imputed to Congress a finding that was directly contrary to Congress' actual understanding, but also ventured a new form of intermediate

scrutiny that would substitute conjecture for concrete evidence and analysis. This Court has instructed that "a governmental body seeking to sustain a restriction [even] on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation and conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). *See also Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2425 (2001) (invalidating restriction on speech where the government did not 'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations," even though the government adduced numerous empirical studies and extensive market data to support its judgment) (internal quotation omitted); *Bartnicki*, 121 S. Ct. at 1764 n.18 ("mere speculation or conjecture" insufficient); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Ibanez v. Florida Dept. of Business & Prof'l Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech).

In *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994), a plurality of this Court explained that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," *id.* at 632, 646, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. The cable must-carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself. In addition, this Court noted that the factual development on remand had yielded "a record of tens of thousands of pages" of evidence. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 187

(1997) (*Turner II*) (internal quotation omitted). The Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat [to over-the-air television] justified enactment of the must-carry provisions." *Id.* at 196. The Court pointed to "specific support" for Congress' conclusion (*id.* at 197): "substantive evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). Nothing remotely comparable exists here.

The D.C. Circuit's decision also conflicts with *U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000), which invalidated a telecommunications privacy rule under intermediate First Amendment scrutiny and held that "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *Id.* at 1234-35.

The D.C. Circuit's holding is directly contrary. According to the D.C. Circuit, the government may carry its burden by simply asserting a "broad interest in privacy" and then tautologically imputing to Congress a fictional finding that the challenged restriction on speech, together with its oddly shaped exceptions, is warranted by unspecified facts that Congress must be assumed to have ascertained and weighed. This abjectly deferential, and indeed fail-safe, approach conflicts hopelessly with this Court's decisions and with lower court opinions properly interpreting them. *See, e.g., Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (invalidating regulation of chiropractors' advertising,

which was based on "common sense" and anecdotal evidence); *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998) (rejecting proposed governmental interest due to state's failure to proffer evidence to support it); *Harman v. City of New York*, 140 F.3d 111, 122 (2d Cir. 1998) (relying on *Turner I* to conclude that, under intermediate scrutiny, "the government cannot rely on assertions, but must show a basis in fact for its concerns").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1141

TRANS UNION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

February 6, 2001, Argued

April 13, 2001, Decided

On Petition for Review of an Order of the Federal Trade Commission

TATEL, Circuit Judge:

Petitioner, a consumer reporting agency, sells lists of names and addresses to target marketers--companies and organizations that contact consumers with offers of products and services. The Federal Trade Commission determined that these lists were "consumer reports" under the Fair Credit Reporting Act and thus could no longer be sold for target marketing purposes. Challenging this determination, petitioner argues that the Commission's decision is unsupported by substantial evidence and that the Act itself is unconstitutional. Because we find both arguments without merit, we deny the petition for review.

I

Petitioner Trans Union sells two types of products. First, as a credit reporting agency, it compiles credit reports about individual consumers from credit information it collects from banks, credit card companies, and other lenders. It then sells these credit reports to lenders, employers, and insurance

companies. Trans Union receives credit information from lenders in the form of "tradelines." A tradeline typically includes a customer's name, address, date of birth, telephone number, Social Security number, account type, opening date of account, credit limit, account status, and payment history. Trans Union receives 1.4 to 1.6 billion records per month. The company's credit database contains information on 190 million adults.

Trans Union's second set of products--those at issue in this case--are known as target marketing products. These consist of lists of names and addresses of individuals who meet specific criteria such as possession of an auto loan, a department store credit card, or two or more mortgages. Marketers purchase these lists, then contact the individuals by mail or telephone to offer them goods and services. To create its target marketing lists, Trans Union maintains a database known as MasterFile, a subset of its consumer credit data-base. MasterFile consists of information about every consumer in the company's credit database who has (A) at least two tradelines with activity during the previous six months, or (B) one tradeline with activity during the previous six months plus an address confirmed by an outside source. The company compiles target marketing lists by extracting from Master-File the names and addresses of individuals with characteristics chosen by list purchasers. For example, a department store might buy a list of all individuals in a particular area code who have both a mortgage and a credit card with a $ 10,000 limit. Although target marketing lists contain only names and addresses, purchasers know that every person on a list has the characteristics they requested because Trans Union uses those characteristics as criteria for culling individual files from its database. Purchasers also know that every individual on a target marketing list satisfies the criteria for inclusion in MasterFile.

The Fair Credit Reporting Act of 1970 ("FCRA"), 15 U.S.C. §§ 1681, 1681a-1681u, regulates consumer reporting agencies like Trans Union, imposing various obligations to protect the

privacy and accuracy of credit information. The Federal Trade Commission, acting pursuant to its authority to enforce the FCRA, *see* 15 U.S.C. § 1681s(a), determined that Trans Union's target marketing lists were "consumer reports" subject to the Act's limitations. The FCRA defines "consumer report" as:

> Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1). Finding that the information Trans Union sold was "collected in whole or in part by [Trans Union] with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA," and concluding that target marketing is not an authorized use of consumer reports under section 1681b, *In re Trans Union Corp.*, 118 F.T.C. 821, 891 (1994), the Commission ordered Trans Union to stop selling target marketing lists, *id.* at 895.

Trans Union petitioned for review. In *Trans Union Corp. v. FTC*, 317 U.S. App. D.C. 133, 81 F.3d 228 (D.C. Cir. 1996) ("*Trans Union I*"), we agreed with the Commission that selling consumer reports for target marketing violates the Act. 81 F.3d at 233-34. We nevertheless set aside the Commission's determination that Trans Union's target marketing lists amounted

to consumer reports. *Id.* at 231-33. The Commission, we held, failed to justify its finding that Trans Union's lists, by conveying the mere fact that consumers had a tradeline, were communicating information collected for the purpose of determining credit eligibility. We found that the Commission had failed to provide evidence to support the proposition that "the mere existence of a tradeline, as distinguished from payment history organized thereunder," was used for credit-granting decisions or was intended or expected to be used for such decisions. *Id.* at 233. (The parties' arguments in Trans Union I and in the proceedings on remand focused on the relevance of the information in the company's lists to consumer eligibility for credit; accordingly, the information's relevance to the other uses the statute lists--such as determining eligibility for insurance and employment--are not at issue in this case. *See In re Trans Union Corp.*, Opinion of the Commission, No. 9255, slip op. at 16 n.20 (Feb. 10, 2000) ("FTC Opinion").)

On remand, following extensive discovery, more than a month of trial proceedings, and an initial decision by an Administrative Law Judge, the Commission found that Trans Union's target marketing lists contain information that credit grantors use as factors in granting credit. Accordingly, the Commission concluded, the lists are "consumer reports" that Trans Union may not sell for target marketing purposes. FTC Opinion at 33. The Commission also rejected Trans Union's argument that such a restriction would violate its First Amendment rights. Applying intermediate scrutiny, the Commission found that the government has a substantial interest in protecting private credit information, that the FCRA directly advances that interest, and that the Act's restrictions on speech are narrowly tailored. *Id.* at 37-52. The Commission thus ordered Trans Union to "cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists, to any person unless [the company] has reason to believe that such person intends to use the consumer report for purposes

authorized under Section [1681b] of the Fair Credit Reporting Act." *In re Trans Union Corp.*, Final Order, No. 9255 (Feb. 10, 2000). Trans Union again petitions for review.

II

As we pointed out in *Trans Union I*, the first element of the FCRA's definition of consumer report--"bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," 15 U.S.C. § 1681a(d)(1)--"does not seem very demanding," for almost any information about consumers arguably bears on their personal characteristics or mode of living. *See* 81 F.3d at 231. Indeed, Trans Union does not challenge the Commission's conclusion that the information contained in its lists meets this prong of the definition of consumer report.

Whether the company's target marketing lists qualify as consumer reports thus turns on whether information they contain "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for [credit]." 15 U.S.C. § 1681a(d)(1). According to the Commission, "a factor in establishing the consumer's eligibility for [credit]," *id.*, includes any type of information credit grantors use in their criteria for "prescreening" or in "credit scoring models." *See* FTC Opinion at 16-17. "Prescreening" involves selecting individuals for guaranteed offers of credit or insurance. *See id.* at 18; *see also Trans Union I*, 81 F.3d at 234 (defining "prescreening" as "the sale of a list of people preselected for credit worthiness by some specified criteria, where the buyer of the list agrees in advance to make a firm offer of credit to each listed person"). "Credit scoring models" are statistical models for predicting credit performance that are developed by observing the historical credit performance of a number of consumers and identifying the consumer characteristics that correlate with good and bad credit performance. *See* FTC Opinion at 17. Applying its

prescreening/credit scoring model standard, the Commission found that Trans Union's lists contain the type of information "'used' and/or 'expected to be used' ... as a factor in establishing a consumer's eligibility for credit." *Id.* at 15; *see also id.* n.19.

Trans Union urges us to reject the Commission's interpretation of the Act in order to avoid what the company calls "serious constitutional questions." Pet'r Opening Br. at 9. In support, it cites *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, where the Supreme Court refused to defer to the NLRB's interpretation of a provision of the NLRA because the Court believed it raised serious First Amendment problems. 485 U.S. 568, 574-77 (1988). But as we demonstrate in Section III, infra, Trans Union's constitutional arguments are without merit, so we have no basis for rejecting the Commission's statutory interpretation on that ground.

Nor has Trans Union offered a basis for questioning the Commission's statutory interpretation on other grounds. The company does not mention the Commission's interpretation of the statute in the "Issues Presented For Review" section of its brief. *Cf.* Fed. R. App. P. 28(a)(5) (requiring that appellants' and petitioners' briefs state the issues presented for review). Although scattered language in the brief hints at a statutory interpretation challenge, that language appears in a section entitled "The Record Does Not Support The Conclusion Reached By The Commission." Trans Union has thus failed to put the Commission on notice that it faced a nonconstitutional challenge to its interpretation of the statute.

We have the same reaction to the brief's occasional suggestions that the Commission's decision was arbitrary and capricious. Not only do these suggestions appear in a section entitled "The Commission's Interpretation Of FCRA Raises Serious Constitutional Questions," *see, e.g.*, Pet'r Opening Br. at 19 (referring to "illogical contradictions"), but the list of issues presented for review neither mentions the arbitrary and

capricious standard nor otherwise questions the reasonableness of the Commission's decision.

We thus turn to the one non-constitutional argument that Trans Union clearly mounts: that the Commission's decision is unsupported by substantial evidence. A footnote to the title of this portion of its brief states:

> The Order is replete with statements unsupported by the evidence.... The word limitation of [Federal Rule of Appellate Procedure] 32(a)(7) makes it impossible to address each such misstatement here. It is the responsibility of the Commission's counsel, however, to ensure that the Court is not misled by the statements in the Order not supported by the evidence.

Id. at 21 n.7. To bring a substantial evidence challenge, however, Trans Union must do more than assert generally that the decision is unsupported by substantial evidence. It must identify the specific findings it challenges and demonstrate that each finding is either unsupported by evidence or, because the Commission unreasonably discounted contrary evidence, unsupported by "the record in its entirety." *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The 14,000 words permitted by Rule 32(a)(7) are more than enough to accomplish this task.

Instead of challenging the Commission's findings regarding specific target marketing products, Trans Union points to evidence relating to the general question of whether the information in its target marketing lists is used to determine credit worthiness. This is not the question before us. As we indicate above, the Commission interprets "factor in establishing the consumer's eligibility for credit," 15 U.S.C. § 1681a(d)(1), to include any information considered by lenders in prescreening, which, as two witnesses testified, can involve consideration of criteria other than credit worthiness, *e.g.*, whether a given consumer is likely to respond to an offer of credit. Because Trans Union has not challenged the Commission's interpretation of the

statute, its argument that the information the company sells is not actually used to determine credit worthiness is beside the point. Moreover, Trans Union cites no testimony refuting the Commission's finding that the information in its target marketing lists is used in prescreening.

Not only has Trans Union thus failed to mount a proper substantial evidence challenge to the Commission's finding that lenders take list information into account in credit models and prescreening, but we have no doubt that the decision does find support in the record. Consider, for example, Trans Union's "Master File/Selects" product line, which allows marketers to request lists based on any of five categories of information: (1) credit limits (e.g., consumers with credit cards with credit limits over $ 10,000), (2) open dates of loans (e.g., consumers who took out loans in the last six months), (3) number of tradelines, (4) type of tradeline (e.g., auto loan or mortgage), and (5) existence of a tradeline. The Commission cites testimony and other record evidence that support its finding that lenders consider each of these five categories of information in prescreening or credit scoring models. Beginning with credit limits, the Commission cites the testimony of a statistician who builds credit scoring models. FTC Opinion at 19. That witness explained that scoring models rely in part on consumer utilization of credit, calculated by dividing a consumer's current outstanding balance by the consumer's credit limit. To support its finding regarding open dates of loans, the Commission relied on the testimony of a vice president of a company that builds credit scoring models. *Id.* According to that witness, some scoring models use the open date of the oldest tradeline in a consumer's credit file as a predictive characteristic. The witness also testified that some credit scoring models use the date of the most recently opened tradeline to determine credit risk. To support its finding that information about the number of tradelines in a consumer's credit file is a consumer report, the Commission cites the testimony of a vice president in charge of direct mail processing

for a bank's credit card department who explained that, in its credit making decisions, her bank considers the number of tradelines consumers possess. *Id.* at 20 n.30. The Commission also points to record evidence demonstrating that Trans Union itself uses the number of tradelines as a predictive characteristic in its credit scoring models. *Id.* at 20. As to the type of tradeline, the Commission cites the testimony of representatives of compa[illegible]s that design credit models who explained that some credit sc[illegible]ing models, including two used by Trans Union, take into accou[illegible]session of a bank card. FTC Opinion at 21-22. One witness testified that Trans Union scoring models also consider possession of a finance company loan to be a predictive characteristic. Another witness, this one representing a credit card company, testified that his company's scoring models assign points for possession of a mortgage, retail tradeline, or bank card. *Id.* at 21.

The record also contains sufficient evidence to support the Commission's resolution of the issue remanded by *Trans Union I*: whether mere existence of a tradeline is "a factor in credit-granting decisions." 81 F.3d at 233. An employee of a bank that issues credit cards testified that to be eligible for credit, an individual must have at least one tradeline. FTC Opinion at 25. The vice president of credit scoring at another credit card issuer testified that the very first question her company asks in prescreening is whether the consumer has a tradeline that has been open for at least a year. Challenging the implications of this testimony, Trans Union argues that banks ask whether consumers have tradelines not because the existence of a tradeline is itself a factor in determining credit eligibility, but because banks want to determine whether there is enough information in consumer files to make credit eligibility determinations. This may be true. But as we explain above, our task is limited to determining whether substantial record evidence supports the Commission's finding that banks consider the existence of a tradeline as a factor in prescreening or credit models. Because the record contains

such evidence, we have no basis for questioning the Commission's decision.

Trans Union has identified one potentially troubling inconsistency in the Commission's decision. As the company points out, record evidence demonstrates that lenders consider names and addresses when prescreening consumers for guaranteed offers of credit, yet the Commission does not prohibit the sale of names and addresses for target marketing purposes. Regarding addresses, the Commission's opinion says, "although some lenders will not extend credit to consumers with a P.O. Box address, we do not find that the P.O. Box feature bears on 'credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living.'" *Id.* at 31 n.50. It is not clear, however, why receiving mail at a post office should not be considered an aspect of an individual's "mode of living." We need not resolve this issue, however, because Trans Union presents neither an arbitrary and capricious nor a statutory interpretation challenge to the Commission's failure to prohibit the sale of names and addresses. *See* supra at 6-7.

Nor must we resolve any inconsistency between the Commission's decision in this case and a 1993 consent agreement between the Commission and a Trans Union competitor, TRW (now Experian). In contrast to the Commission's decision here, that agreement allowed TRW to sell information about consumers' ages to target marketers. Again, although this might suggest that the Commission has acted arbitrarily and capriciously in treating similarly situated entities differently, Trans Union has not made such a challenge. The Commission thus seems correct that "the TRW Consent is not before us in this matter and it is without precedential effect on this opinion." FTC Opinion at 16 n.22.

III

Trans Union's constitutional challenge consists of two

arguments. It claims first that the FCRA is vague, thus running afoul of the due process guarantee of the Fifth Amendment. Trans Union also argues that the statute violates the free speech guarantee of the First Amendment because it restricts its ability to disseminate information.

Beginning with the Fifth Amendment challenge, we are guided by *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "Laws," the Court said, must not only "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," but in order to prevent "arbitrary and discriminatory enforcement," they must also "provide explicit standards for those who apply them." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Emphasizing that these principles should not "be mechanically applied," the Court held that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* The "regulated enterprise," the Court added, "may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* Finally, "the consequences of imprecision are qualitatively less severe" when laws have "scienter requirements" and "civil rather than criminal penalties." 455 U.S. at 499.

Applying this standard, we see no merit in Trans Union's vagueness argument. To begin with, because the FCRA's regulation of consumer reporting agencies is economic, it is subject to "a less strict vagueness test." *Id.* at 498. Moreover, Trans Union has "the ability to clarify the meaning of the [FCRA]," *id.*, through the Commission's advisory opinion procedures. *See* 16 C.F.R. §§ 1.1-1.4 (establishing general procedures for obtaining advisory opinions); *id.* § 2.41(d) (establishing procedures for obtaining guidance regarding compliance with FTC orders). Selectively quoting from the

Commission's regulations, the company disputes the usefulness of advisory opinions, suggesting that they can be changed at any time and that "the Commission expressly reserves the right upon rescission of an earlier opinion to commence an enforcement proceeding." Pet'r Reply Br. at 10. The relevant regulation states as follows (the sentences Trans Union omits are in italics):

> Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

16 C.F.R. § 1.3(b) (emphasis added). Although the next subsection of the regulation states that "advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding, " *id.* § 1.3(c), the portion of the regulation omitted by Trans Union makes quite clear that the company can safely rely on advisory opinions without fear of penalty should the Commission later change its mind.

The FCRA does not fit quite so comfortably under the other *Hoffman Estates* criteria. Although the Act does contain a clear scienter requirement for the imposition of civil fines, *see, e.g.*, 15 U.S.C. § 1681s(a)(2)(A) ("knowing"), it also provides that anyone who negligently violates the Act may be liable to injured consumers for actual damages. *Id.* § 1681o(a). The statute also

authorizes criminal penalties. *Id.* § 1681r (providing for possible imprisonment for "any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information"). Even given these distinctions, however, because of the extremely clear process for "clarifying the meaning of the regulation," *Hoffman Estates*, 455 U.S. at 498, Trans Union simply does not face a due process risk of prosecution for conduct it could not have known to be illegal.

Trans Union's First Amendment challenge fares no better. Banning the sale of target marketing lists, the company says, amounts to a restriction on its speech subject to strict scrutiny. Again, Trans Union misunderstands our standard of review. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Supreme Court held that a consumer reporting agency's credit report warranted reduced constitutional protection because it concerned "no public issue." *Id.* at 762. "The protection to be accorded a particular credit report," the Court explained, "depends on whether the report's 'content, form, and context' indicate that it concerns a public matter." *Id.* n.8. Like the credit report in *Dun & Bradstreet*, which the Supreme Court found "was speech solely in the interest of the speaker and its specific business audience," *id.* at 762, the information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern. Trans Union target marketing lists thus warrant "reduced constitutional protection." *Id.* n.8.

We turn then to the specifics of Trans Union's First Amendment argument. The company first claims that neither the FCRA nor the Commission's Order advances a substantial government interest. The "Congressional findings and statement of purpose" at the beginning of the FCRA state: "There is a need to insure that consumer reporting agencies exercise their grave

responsibilities with ... respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). Contrary to the company's assertions, we have no doubt that this interest--protecting the privacy of consumer credit information--is substantial.

Trans Union next argues that Congress should have chosen a "less burdensome alternative," i.e., allowing consumer reporting agencies to sell credit information as long as they notify consumers and give them the ability to "opt out." Pet'r Opening Br. at 43-44. Because the FCRA is not subject to strict First Amendment scrutiny, however, Congress had no obligation to choose the least restrictive means of accomplishing its goal.

Finally, Trans Union argues that the FCRA is underinclusive because it applies only to consumer reporting agencies and not to other companies that sell consumer information. But given consumer reporting agencies' unique "access to a broad range of continually-updated, detailed information about millions of consumers' personal credit histories," FTC Opinion at 1, we think it not at all inappropriate for Congress to have singled out consumer reporting agencies for regulation. As we explained in *Blount v. SEC*, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." 314 U.S. App. D.C. 52, 61 F.3d 938, 946 (D.C. Cir. 1995). The primary purpose of underinclusiveness analysis is to "ensure that the profferred state interest actually underlies the law, [so] a rule is struck for underinclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest because it provides only ineffective or remote support for the asserted goals, or limited incremental support." *Id.* (internal citations omitted). To survive a First Amendment underinclusiveness challenge, therefore, "neither a perfect nor even the best available fit between means and ends is required." *Id.* The FCRA easily satisfies this standard.

Trans Union contends that the statute is underinclusive for

another reason, i.e., because it allows the sale of consumer reports for the purpose of guaranteed offers of credit or insurance. *Trans Union I* disposes of this argument:

> Being singled out for a firm offer of credit is exactly the sort of thing the Act seeks to promote, and a purpose for which it is quite reasonable to infer the consumer's implicit waiver or consent. Moreover, prescreening and the guaranteed offers of credit it spawns can only take place through the use of consumer reports, whereas the use of credit data for non-credit-related mailings is at most helpful to those ends.

81 F.3d at 234.

IV

Having considered and rejected Trans Union's other arguments, we deny the petition for review.

So Ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1141

TRANS UNION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

October 23, 2001, Filed

On Petition for Rehearing

TATEL, Circuit Judge:

In its petition for rehearing, Trans Union argues that we incorrectly applied *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985), when we decided that target marketing lists merit only intermediate scrutiny. In *Dun & Bradstreet*, the Supreme Court held that a consumer reporting agency's wholly false credit report warranted only qualified constitutional protection because the report "concerned no public issue." *Id.* at 762. In reaching that conclusion, the Court noted that the report constituted "speech solely in the individual interest of the speaker and its specific business audience," and that the report reached only "five subscribers, who, under the terms of the subscription agreement, could not distribute it further." *Id.* The same is true here: Trans Union's target marketing lists interest only Trans Union and its target marketing customers, and Trans Union sells its lists for one-time use, prohibiting purchasers from disseminating the data.

To be sure, Trans Union's lists are not "wholly false," as was the Dun & Bradstreet credit report, nor is the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, 1681a-1681u, an "incidental state regulation," as *Dun & Bradstreet* termed the

state defamation law challenged in that case. 472 U.S. at 762. Nothing in *Dun & Bradstreet*, however, suggests that these two factors were critical to the Court's decision. The important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its "specific business audience" (its customers). *Id.*

One additional consideration, absent in *Dun & Bradstreet*, supports our conclusion that Trans Union's target marketing lists comprise speech of purely private concern. The lists contain names of private individuals, not incorporated businesses like the respondent in *Dun & Bradstreet*. We do not suggest that corporations lack privacy interests, nor that all corporate speech is somehow inherently public. But the particular information at issue in this case--people's names, addresses, and financial circumstances–is less public than the same information about companies whose articles of incorporation and financial statements are generally available for inspection. *Cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("By placing the information in the public domain ..., the State must be presumed to have concluded that the public interest was thereby being served.").

In support of its argument that the FCRA's target marketing limitation merits strict scrutiny, Trans Union cites cases in which the Supreme Court "struck down privacy-based restrictions on the publication of truthful information." Pet. at 5-6. Unlike this case, however, most of the cited cases involve speech on matters of public concern. *E.g., Bartnicki v. Vopper*, 121 S. Ct. 1753, 1765 (2001) (concluding that privacy concerns raised by disclosure of contents of private cellular telephone call "give way when balanced against the interest in publishing matters of public importance"); *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (holding that state may not punish publication of "'lawfully obtained truthful information about a matter of public significance'" (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979))); *NAACP v. Claiborne Hardware Co.*, 458 U.S.

886, 913 (1982) (concluding that disclosure of names of civil rights boycott violators is "expression on public issues" and rests on "highest rung of the hierarchy of First Amendment values") (citations omitted); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (deciding that state may not punish press for disclosing confidential judicial proceedings, in part because a "responsible press has always been regarded as the handmaiden of effective judicial administration") (citations omitted); *Cox Broad. Corp.*, 420 U.S. at 491-92 (noting that "with respect to judicial proceedings ... the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice"). Another cited case involves speech addressed to a large, public audience. *Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) (recognizing leafleting as central to public discourse because the "freedom to distribute information to every citizen ... is ... clearly vital to the preservation of a free society"). Finally, two cases concern commercial speech that--like the speech at issue here--merits only intermediate scrutiny. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (lawyer advertising); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (pamphlets about contraceptives). Trans Union's reliance on these last two cases is particularly misplaced, for they stand not for the principle that speech rights "prevail" over privacy rights "virtually without exception," Pet. at 5, but instead for the principle that speech of largely private concern may warrant only qualified protection.

Trans Union next argues that by permitting the sale of consumer reports to facilitate guaranteed offers of credit or insurance (prescreening), but prohibiting the sale of similar information to facilitate offers of other goods or services (target marketing), the FCRA makes a content-based distinction deserving strict scrutiny. The notion that content-based speech restrictions warrant strict scrutiny, however, derives from cases involving fully protected speech. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down

content-based sales tax on print media); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down content-based law that forbade noncommercial educational broadcasting stations from editorializing). Trans Union's target marketing lists are private speech warranting only qualified constitutional protection. We need not now decide whether content-based restrictions of private speech might sometimes merit strict scrutiny. It is sufficient to note that given the Supreme Court's commercial speech doctrine, which creates a category of speech defined by content but afforded only qualified protection, the fact that a restriction is content-based cannot alone trigger strict scrutiny. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (applying intermediate scrutiny to determine constitutionality of Cincinnati rule banning handbill racks--but not newspaper racks--on public property).

In the alternative, Trans Union argues that the FCRA's target marketing restriction fails even intermediate scrutiny. Again, the cases the company cites are distinguishable. In *Edenfield v. Fane*, for example, the Supreme Court struck down a state rule prohibiting certified public accountants from personally soliciting new clients, partly because the state failed to establish that the rule would directly promote the state's interest in reducing fraud. 507 U.S. 761 (1993). Here, by contrast, the government cannot promote its interest (protection of personal financial data) except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent. Thus, the FCRA unquestionably advances the identified state interest. For the same reason, unlike in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, where the Court struck down a ban on casino advertising, in part because "practical and nonspeech-related forms of regulation ... could more directly and effectively" advance the government's interest in reducing casino gambling, 527 U.S. 173, 192 (1999), here there is no possibility that some less-restrictive

or nonspeech-related regulation could achieve the identified state interest. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down prohibition on beer labels that identify alcohol content, in part because government interest in preventing brewers from competing on basis of alcohol content could be advanced through less-restrictive regulations); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (invalidating Rhode Island's ban on advertising of retail prices of alcoholic beverages because "alternative forms of regulation that would not involve any restriction on speech ... would be more likely to achieve the State's goal of promoting temperance"). Finally, also unlike in *Greater New Orleans Broadcasting Ass'n*, where the challenged statute was "pierced by exemptions and inconsistencies," 527 U.S. at 190, here we confront a law with just one exception: the permissive standard applied to information sold for prescreening.

Nothing in *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001), issued after publication of our opinion, requires a different result. In that case, the Supreme Court struck down Massachusetts regulations governing advertising of various tobacco products, largely because the sheer breadth of the regulations raised questions about the fit between the regulations' means (restricting advertising) and ends (preventing underage tobacco use). *Id.* at 2425. *Lorillard* noted several ways in which the "breadth and scope of the regulations" evidenced that Massachusetts had not performed "a careful calculation of the speech interests involved." *Id.* For example, the regulations failed to target "advertising and promotion practices that appeal to youth," encompassing instead all forms of communication, and even restricting a retailer's ability to "answer inquiries [from adults] about its tobacco products." *Id.* at 2426. No similar problem exists here. Aiming directly at its intended target, supra at 4, the FCRA has neither indirect nor unintended effects on speech. The statute therefore sweeps only as broadly as necessary to accomplish its goal: protecting the privacy of personal

financial information. A narrower restriction would immediately lead to increased disclosure of such information. The FCRA's means and ends are thus one, leaving no possibility of a careless or imperfect "fit."

As for Trans Union's suggestion that Congress should have adopted an opt-out scheme, we note that Congress considered such a scheme, S. Rep. 104-185, at 36-38 (1995); H.R. Rep. 102-692, at 25-27 (1992), but settled on an opt-in scheme instead, 15 U.S.C. § 1681b(a)(2). As enacted, therefore, the statute permits Trans Union to sell a consumer's private information as long as the consumer consents. Although the opt-in scheme may limit more Trans Union speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a "remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 217-18 (1997) (citations omitted). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... [a] regulation [is] not ... invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 218.

Trans Union also argues that the FCRA's permissive treatment of information sold for prescreening "illustrates ... the [statute's] lack of narrow tailoring." Trans Union's Supp. Br. at 4. On the contrary, the statute's differential treatment of information sold for prescreening and that sold for target marketing recognizes that individuals' privacy interests in personal information are not absolute: Such interests are defined not only by the content of the information, but also by the identity of the audience and the use to which the information may be put. For example, people who fiercely protect the privacy of personal medical information may nevertheless disclose such information on job or medical insurance applications. People who protect the privacy of their salaries may nevertheless reveal

how much they make to qualify for a mortgage. So too, here. Congress apparently believes that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches. Given the nature of intermediate scrutiny, it can hardly be said that the First Amendment prohibits Congress from balancing privacy interests differently in these different circumstances--particularly since the FCRA's express purpose is to facilitate credit, not target marketing.

Nor does the FCRA's permissive treatment of information sold for prescreening demonstrate, as Trans Union argues, that the statute is unconstitutionally underinclusive. " '[A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective.' " *Trans Union v. FTC*, 245 F.3d 809, 819 (2001) (citing *Blount v. SEC*, 314 U.S. App. D.C. 52, 61 F.3d 938, 946 (D.C. Cir. 1995)). Underinclusiveness analysis "ensures that the proffered state interest actually underlies the law, [so] a rule is struck for underinclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest." *Blount*, 61 F.3d at 946 (citations omitted). To survive a First Amendment underinclusiveness challenge, therefore, "neither a perfect nor even the best available fit between means and ends is required." *Id.* The FCRA satisfies this standard.

Finally, Trans Union argues that we erred by declining to consider its statutory interpretation and arbitrary and capricious claims. We explained, however, that Trans Union's briefs fell far short of this Circuit's requirements for presenting issues for decision. *Trans Union v. FTC*, 245 F.3d at 814. To be sure, the briefs attempted statutory claims, *id.* (discussing petitioner's briefs), and we had discretion to consider them. *Cf. Public Citizen Health Research Group v. FDA*, 337 U.S. App. D.C. 343, 185 F.3d 898, 903 n.* (D.C. Cir. 1999). But because of the utter incoherence of Trans Union's briefs, and because we discerned

no substantial constitutional issue, *cf. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 574-77 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."), we chose not to address those claims. Since Trans Union's petition for rehearing merely clarifies arguments the company's briefs had muddied, instead of restating arguments claimed to have been overlooked or misunderstood, the petition comes too late.

The petition for rehearing is denied.

So ordered.

On Petition for Review of an Order of the Federal Trade Commission

ORDER

Upon consideration of Petitioner's petition for rehearing filed May 25, 2001, and of the opposition thereto, it is

ORDERED that the petition be denied, as is more fully set forth in the opinion of the court filed herein this date.

Per Curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1141

TRANS UNION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

October 23, 2001, Filed

Before: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges.

ORDER

___Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per curiam.

APPENDIX D (RELEVANT EXCERPTS)

IN THE MATTER OF TRANS UNION CORPORATION

Docket No. 9255

Federal Trade Commission

FINAL ORDER

February 10, 2000

OPINION OF THE COMMISSION

By Thompson, Commissioner:

I. INTRODUCTION

In this information age, technological advances in information gathering and dissemination have generated substantial benefits for American consumers by providing them with, among other things, the strongest and most efficient credit markets in the world. In 1970, Congress recognized the importance of personal financial data to these markets when it enacted the Fair Credit Reporting Act ("FCRA" or "Act"). Congress expressly noted in the Act's findings and statement of purpose that the "banking system is dependent upon fair and accurate credit reporting" and acknowledged the "vital role" of credit bureaus (called "consumer reporting agencies" under the Act) "in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1) and (3).

Under the U.S. credit reporting system, consumer reporting agencies (hereinafter "CRAs") collect consumer credit information from credit grantors and other sources, compile the information into credit reports, and then sell the reports to banks and other lenders, as well as to employers and insurance companies. Credit grantors have an incentive to provide data to CRAs because they benefit from the credit reporting system as

well. The effectiveness of this system depends upon a constant flow of consumers' credit information into large databases maintained by CRAs. It also depends on accuracy and timeliness. As a result, CRAs, unlike other data providers, have access to a broad range of continually-updated, detailed information about millions of consumers' personal credit histories. This information includes, for example, consumers' delinquencies and defaults, the types of credit accounts they have, when they obtained credit, and additional information that banks and other lenders often use in determining whether to extend credit.

Although Congress understood the importance of CRAs' access to such information regarding millions of consumers, it also recognized the importance of protecting consumers' financial privacy. In fact, legislative history reveals that one of the FCRA's principal goals was to protect the privacy of individuals whose sensitive credit and financial data are collected, used, reviewed and transmitted by CRAs.[1] Thus, in enacting the FCRA, Congress struck a balance between these competing interests. While Congress did not disturb the ability of CRAs to collect personal credit information, it did provide safeguards designed to protect the confidentiality of these data. Specifically, Section 604 of the FCRA limits the circumstances under which a CRA may disclose a "consumer report"[2] -- the statutory term for information commonly referred to as a credit report. For instance, Section 604 allows a CRA to furnish consumer reports to, inter alia, persons with certain "permissible

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[1] Report of the Committee on Banking and Currency, S. Rep. No. 91-517 (1969).

[2] Section 603(d) of the FCRA defines "consumer report" as: "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for . . . credit or insurance . . . [or] employment . . ." 15 U.S.C. § 1681a(d).

purposes." These permissible purposes include: (1) the extension of credit; (2) employment purposes; (3) underwriting of insurance; (4) determination of license eligibility; (5) risk assessment for an existing credit obligation; and (6) legitimate business need for the information. 15 U.S.C. § 1681b. Section 607 of the Act also requires CRAs to maintain reasonable procedures to ensure that they only furnish consumer reports for the purposes set forth in Section 604. See 15 U.S.C. § 1681e(a).

After careful consideration of the parties' arguments and thorough review of the substantial record in this case, the Commission concludes that Trans Union Corporation ("Trans Union"), a CRA, violates or has violated Sections 604 and 607 of the FCRA through the activities of its target marketing business.[3] In connection with its consumer reporting business, Trans Union receives various types of personal, credit information about consumers. Much of this information constitutes a "consumer report" as that term is defined by Section 603(d). Trans Union's sale of consumer reports to target marketers without a "permissible purpose" under the FCRA is a violation of the Act.

II. PROCEDURAL HISTORY

On December 15, 1992, the Commission filed an administrative complaint alleging, in pertinent part, that Trans Union violated Sections 604 and 607(a) of the FCRA by

> compiling, for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and providing such consumer reports in the form

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[3] As described infra, Trans Union may have discontinued some of the practices at issue in this matter. To the extent it continues to engage in certain other of the activities at issue, however, Trans Union's FCRA violations are ongoing.

> of target marketing lists to persons that do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under [the FCRA].

In re Trans Union Corporation, 116 F.T.C. 1334, 1336 (1993).

On September 20, 1993, Administrative Law Judge ("ALJ") Parker entered a summary decision in favor of Complaint Counsel. The Commission upheld that decision, ruling specifically that Trans Union's target marketing lists were "consumer reports" because the minimum criteria for a consumer file appearing on any of the target marketing lists -- that the consumer had at least two open credit accounts -- satisfied the definition of "consumer report" under Section 603(d) of the Act. *In re Trans Union Corporation*, 118 F.T.C. 821, 869-70 (1994).

A key part of the Commission's determination was its finding that the mere existence of two credit accounts, or "tradelines,"[4] constituted information "collected in whole or in part by [Trans Union] with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the

[4] A "tradeline" is a segment of a consumer report that reflects a credit relationship between a consumer and a creditor -- usually a debt or a potential debt owed by the consumer to the credit grantor. An example of such an account relationship is a consumer's Visa, American Express or other credit card account. A typical consumer report contains multiple tradelines, and each reveals specific information about the account relationship, including: the account holder's account number, name, address, telephone number, date of birth, social security number, any generational suffix; the name and subscriber code of the credit grantor and its kind of business; the open date of the account; the verified date on the account; the type of loan; the credit limit assigned by the credit grantor; the payment patterns and history; the present status of the account; and the closed date of the account. Public record information such as bankruptcies, tax liens, foreclosures and civil judgments as well as collection accounts are also considered tradelines. See Stockdale 872, 875/23 -- 876/2, 888/5-24, 893/6-15, 894/4-12, 895/16 -- 896/1, 896/19-23, 897/13 -- 898/2; Botruff 2049/1-6; Weith 1844/18-22; Smith 3372/15 -- 3373/15.

consumer's eligibility [for credit]." *Id.* at 861. The Commission also held that target marketing is not a permissible purpose under the FCRA. Therefore, according to the Commission, Trans Union violated the FCRA by disclosing consumer reports to persons lacking any of the required permissible purposes.

In ruling on Trans Union's appeal of the Commission's decision, the United States Court of Appeals for the District of Columbia Circuit agreed that target marketing was not a permissible purpose under the Act. *Trans Union Corp. v. F.T.C.*, 81 F.3d 228 (D.C. Cir. 1996). The Court also held, however, that it was inappropriate for the Commission to use summary procedures to decide whether Trans Union's target marketing lists were consumer reports because the question presented a genuine issue of material fact. Consequently, the Court remanded the case to the Commission to resolve two primary questions. The first is factual – whether there is sufficient evidence to support the finding that Trans Union's target marketing lists are consumer reports. The second question is a legal one -- if we find that Trans Union's target marketing lists are consumer reports, does the FCRA pass constitutional muster?

On July 31, 1998, Administrative Law Judge James Timony issued an Initial Decision and Order on remand holding that Complaint Counsel provided sufficient evidence to show that Trans Union's lists are "consumer reports" under the Act and that Trans Union disclosed them to entities who lacked a permissible purpose. This disclosure violated Sections 604 and 607(a) of the FCRA. Judge Timony also held that the FCRA, as applied to Trans Union's practices, is constitutional. Trans Union appealed both rulings.[5]

[5] References to the record are abbreviated as follows, using the following hypothetical examples:

Initial Decision	ID at 200.
Initial Decision Finding	IDF-500.
Complaint Counsel Exhibit	CX-500.

After reviewing the full record in this case, including the extensive arguments of the parties, we adopt the ALJ's July 1998 findings and conclusions to the extent that they are consistent with those set forth in this opinion.

* * *

V. FCRA ANALYSIS: ARE TRANS UNION'S TARGET MARKETING LISTS "CONSUMER REPORTS" UNDER THE FCRA?

A. Introduction

As discussed above, Trans Union sells lists of consumer names and addresses to its target marketing customers. In creating these target marketing products, Trans Union applies various criteria to identify those consumers in its large database, CRONUS, who possess specific credit-related characteristics. The resulting lists thus communicate far more information to target marketers than simply names and addresses. A purchaser of a Trans Union target marketing list knows that every consumer included has at least one tradeline and possesses whatever additional characteristics the purchaser has specified.

A key question in this case is whether Trans Union's target marketing lists fall within the Act's definition of "consumer report." If they do, then Section 604 requires that Trans Union sell them only to entities who have a "permissible purpose" as defined by the Act. According to the court of appeals, target marketing is not a permissible purpose. *Trans Union*, 81 F.3d at

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Trans Union Exhibit	TU-500.
Trial Transcript testimony	Jones 1234/56-78.
Deposition Transcript testimony	Jones CX-100 at 123/45-46.
Trans Union's Appellant Brief	TUAB at 200.
Complaint Counsel's Answering Brief	CCAB at 200.
Trans Union's Reply Brief	TURB at 200.
Complaint Counsel's Proposed Findings	CCPF at 200.
Trans Union's Proposed Findings	TUPF at 200.

230. Thus, if Trans Union's lists are consumer reports then Trans Union has violated the FCRA by disseminating those lists for target marketing purposes.

Trans Union's target marketing lists qualify as consumer reports if they communicate information that: (1) bears on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and (2) is "used or expected to be used or collected in whole or in part" to serve as a factor in determining credit eligibility. 15 U.S.C. § 1681a(d)(1) ("Section 603(d)"). Our determination of whether Trans Union's lists are consumer reports does not require a mere application of fact, but instead requires a close examination and interpretation of Section 603(d).[15]

The court of appeals determined that the tradeline information in Trans Union's lists meets the first prong of the consumer report definition -- i.e., it bears on one or more or the seven enumerated factors.[16] With respect to the second prong, however, the Court held there was insufficient evidence to support the Commission's 1994 finding and remanded the case back to the Commission, stating:

> On remand, if the FTC wishes to classify existence-of-tradeline[17] information as a consumer report,

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[15] We are mindful that, to the extent that Section 603(d) raises constitutional questions, we must construe the statute where fairly possible to eliminate such questions as long as such construction is not plainly contrary to Congress' intent. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

[16] "The first element does not seem very demanding, and we do not understand Trans Union to even contest the proposition that a person's having two tradelines 'bear[s]' on one or more of the seven enumerated factors." *Trans Union*, 81 F.3d at 231.

[17] "Existence of a tradeline" refers to the mere existence of tradeline information as determinative of whether the information disclosed is a consumer report under the FCRA. This term is distinct from the term "type of

> it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline, as distinguished from payment history . . . to serve as a factor in credit-granting decisions, or, of course, that someone used or expected it to be used for that purpose. Evidence – lacking here -- that credit decisions could be made, even in part, on such "existence" information might be probative of Trans Union's intent. If under this standard, tradeline-existence information is found not to [be covered by the definition of consumer report], the FTC may of course embark on a similar inquiry about any individual list criterion to which it objects.

Trans Union, 81 F.3d at 233 (footnotes omitted) (emphasis added).

With this direction in mind, we have reviewed what is now a full record in this case and find that the existence-of-tradeline information, as well as other information Trans Union disclosed in its target marketing lists, meets the Section 603(d) definition of a consumer report. We therefore conclude that Trans Union violated the FCRA by selling consumer reports to target marketers who lacked a statutorily permissible purpose.

In reaching this conclusion, we examined Trans Union's various target marketing lists -- the Master File / Selects, proprietary models, and reverse append products -- and find that information disclosed through these products is the type of information that is "used" and/or "expected to be used" in whole or in part[18] for the purpose of serving as a factor in establishing

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tradeline" which refers to the character or type of information that is disclosed. See discussion infra pp. 20-26.

[18] Under Section 603(d), it is not necessary to show that the information communicated by the target marketing lists, standing alone, could be used to make a credit-related decision. We need merely determine that the information is used or expected to be used as "a factor" in such a decision. Trans Union,

a consumer's eligibility for credit.[19] Accordingly, these products are consumer reports and Trans Union cannot lawfully sell them for target marketing purposes.

We also analyzed the demographic information that Trans Union maintains in CRONUS and find that, based on the record before us, most of that information – including name, mother's maiden name, generational designator, address, zip code, telephone number, and social security number -- does not constitute a consumer report because there is no showing that it is used or expected to be used as a factor in determining credit eligibility.[20] We conclude, however, that Trans Union, as a CRA, cannot lawfully disclose age information to target marketers because the record in this case shows that lenders use age as a credit factor and age bears on credit capacity.[21] Accordingly, products that Trans Union creates by way of its consumer

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81 F.3d at 233. Something serves "as a factor" if it "'contributes to the production of a result.'" *United States v. Wilson*, 896 F.2d 856, 858 n.3 (4th Cir. 1990), citing Webster's 3rd International Dictionary, 1971.

[19] In 1995, the Commission took the position before the court of appeals that Trans Union's lists, based on the "existence of two tradelines" feature, were "collected for the purpose of" serving as a factor in credit eligibility decisions. The court of appeals rejected this argument on the grounds that the "'existence of a tradeline' seems not so much 'collected' by Trans Union as created by it for organizing the nuts-and-bolts payment data upon which credit decisions are made." *Trans Union*, 81 F.3d at 232. On remand, Complaint Counsel and Trans Union have focused their argument on the used and expected to be used elements of the definition.

[20] The Commission's argument before the court of appeals focused on the relevance of Trans Union's data to consumer's eligibility for credit, and not to insurance, employment, or other items set forth in Section 603(d). The court of appeals followed suit as did the parties following remand. Accordingly, we limit our analysis to credit eligibility.

[21] We also stress that, although the FCRA does not prohibit Trans Union from disclosing most demographic information, disclosure of such information may raise significant privacy concerns and may facilitate misuses including identity theft.

reporting business that are based upon, or contain, references to age are consumer reports under Section 603(d) and their disclosure for target marketing purposes violates Section 604 of the Act.[22]

* * *

VI. CONSTITUTIONAL ANALYSIS

Trans Union raises two constitutional defenses in this matter. Trans Union first asserts that, by barring it from selling target marketing lists, the FCRA violates the First Amendment of the United States Constitution. Second, Trans Union claims that the FCRA's definition of consumer report is unconstitutionally vague under the Fifth Amendment. We disagree with both arguments.

A. The FCRA Is a Constitutionally Permissible Restriction on Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The right to free speech, however, is not unfettered and it is well settled that different types of speech merit different levels of constitutional protection. Specifically, courts apply the highest degree of protection to speech related to issues of public concern such as political or social change or artistic or scientific expression. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion). Such fully protected speech may be called "pure" speech. *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 861 (3rd Cir. 1984). By contrast, courts apply a reduced or intermediate level of protection to "commercial" speech -- speech, such as advertising, that is related to a commercial transaction. *See, e.g.,*

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[22] As noted, the TRW Consent permits Experian to use age information from its consumer reporting business for target marketing purposes. The TRW Consent is not before us in this matter and it is without precedential effect to this opinion.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 561-63 (1980). Courts have also recognized that the First Amendment does not protect certain types of speech, such as obscenity and "fighting words," *Dun & Bradstreet*, 472 U.S. at 758-59, n.5, or conduct that does not constitute speech, *Michael Barnes, et al. v. Glen Theatre, Inc., et al.*, 501 U.S. 560, 570 (1991). For the reasons discussed below, we find that Trans Union's consumer reports are entitled to intermediate First Amendment protection. Accordingly, we analyze the FCRA under the standard established by the Supreme Court in *Central Hudson* and its progeny and conclude that the Act does not violate the First Amendment by prohibiting Trans Union from selling consumer reports to target marketers.

1. Type of Speech

In order to apply the appropriate First Amendment analysis to Trans Union's challenge to the FCRA, we must initially determine what type of expression or conduct the Act regulates in this case.

a. Pure Speech

Trans Union contends that its target marketing lists are pure speech and, as such, should receive the highest degree of constitutional protection. TUAB at 67-68. We are not persuaded, however, that Trans Union's lists rise to the level of such fully protected pure speech. The Supreme Court has held that speech on public issues deserves the highest degree of protection because the First Amendment "'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Dun & Bradstreet*, 472 U.S. at 759, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech related to matters of purely private concern, however, merits less First Amendment protection because regulation of such speech has less of an impact on the exchange of ideas on public issues. *Id.*

Here, the record clearly establishes that Trans Union's target marketing lists do not concern the types of lofty or important public issues or themes traditionally recognized as central to the First Amendment's guarantee of freedom of expression. *See, e.g., McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334 (1995) (distribution of anonymous political campaign literature); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (display of sign opposing Persian Gulf War); *United States v. Eichman*, 496 U.S. 310 (1990) (burning American flag); *Hustler Magazine, Inc. v. Fulwell*, 485 U.S. 46 (1988) (vulgar parody of public figure); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allegedly libelous newspaper editorial advertisement about public official and civil rights movement); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959) (exhibition of film depicting and expressing approval of adultery). Rather, the lists concern private information about individual consumers' credit history and other confidential, personal financial data. Because the lists do not possess the type of public component that compels full First Amendment protection, we conclude that Trans Union's lists are not pure speech and, consequently, we do not apply the strict scrutiny analysis to the FCRA's restriction on the dissemination of these lists.

b. Nonspeech

We also reject Complaint Counsel's position that the lists are not speech at all and thus fall outside the scope of First Amendment protection. Complaint Counsel argues that Trans Union's lists are not expression but, rather, are simply "commercial products" that Trans Union sells to its customers. CCAB at 58-61.[55] Although Trans Union's lists are products, we

[55] Of course, both Trans Union and Complaint Counsel also assert in the alternative that the target marketing lists are commercial speech and that we should therefore apply intermediate level scrutiny to the FCRA. We analyze commercial speech infra.

find that they do possess a quality of speech because they communicate substantial consumer information to Trans Union's target marketer customers. In other words, the lists Trans Union sells to its clients are more than simply a collection of names and addresses. Instead, these lists reflect Trans Union's complex analysis and qualitative judgment regarding which consumers meet various credit and financial-related criteria. Moreover, although courts have accorded them varying levels of protection, they have also treated consumer reports as speech.[56] Indeed, by questioning the application of the First Amendment here, the court of appeals in this case has necessarily assumed that a consumer report is some form of speech. *See Trans Union*, 81 F.3d at 235.

c. Commercial Speech

The ALJ held that Trans Union's lists constitute commercial speech and, as such, applied intermediate constitutional scrutiny to the FCRA. ID at 88-89. We find that, although the target marketing lists do not possess all the elements typically associated with commercial speech, the lists have sufficient commercial speech qualities (without rising to the level of fully protected pure speech) to warrant intermediate First Amendment Protection. Our conclusion is supported by the full record here as well as Supreme Court precedent.

The Supreme Court has defined the "core notion of commercial speech" as an expression that does no more than

[56] *See Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (credit report "was speech solely in the individual interest of the speaker and its specific business audience"); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (treating consumer credit reports as commercial speech); *U.D. Registry, Inc. v. State*, 40 Cal.Rptr.2d 228, 233 (Cal. 1995) (much of the information contained in the credit reports is "highly protected noncommercial speech"); *Equifax v. Cohen*, 420 A.2d 189 (Me. 1980) (rejecting appeal of lower court determination that credit reports are commercial speech), *cert. denied*, 450 U.S. 916 (1981).

propose a commercial transaction. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 66 (1983) citing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976). Recognizing that the line between commercial and other types of speech is not always distinct, the Court expanded upon the concept by identifying three factors relevant to the determination of whether speech is "commercial": (1) whether the speech is an advertisement; (2) whether it mentions a specific product by name; and (3) whether it is economically motivated. *Bolger*, 463 U.S. at 66-67.

Trans Union's lists do not fall neatly into this core notion of commercial speech as articulated by the Court in *Bolger*. The lists are not advertisements but instead are antecedent to advertisements -- i.e., the solicitations that Trans Union's target marketing customers send to the consumers identified in the target marketing lists. Trans Union's lists also do not mention a product by name; instead, as asserted by Complaint Counsel, they are the actual product. Finally, although Trans Union's marketing list business is certainly motivated by economic considerations, that fact alone does not confer commercial speech status. *See Bolger*, 463 U.S. at 67 (fact that party had an economic motivation for mailing pamphlets at issue was insufficient by itself to turn materials into commercial speech).

Still, *Bolger* does not establish a bright line test for commercial speech and the Supreme Court has also regarded "expression related solely to the economic interests of the speaker and its audience" as commercial speech. *Central Hudson*, 447 U.S. at 561. Similarly, Trans Union creates and sells its lists for its own economic benefit as well as the benefit of its target marketing customers. In other words, while the ultimate consumers who are the subject of Trans Union's lists have an interest in protecting their credit and financial privacy, Trans Union's sale of its target marketing lists is a commercial transaction motivated by the economic interests of the list seller and the list purchaser.

Moreover, in *Dun & Bradstreet*, which concerned a consumer report containing false information, a plurality of Justices found that the consumer report at issue deserved reduced First Amendment protection. The plurality opinion explained that speech related strictly to private concerns has less First Amendment value and merits less stringent protection than speech on matters of public concern. Thus, the level of protection the Court should give to a consumer report turned on whether the report concerned public or private matters. The plurality concluded that, based upon an examination of the content, form and context of the report, it involved "speech solely in the individual interest of the speaker and its specific business audience" and deserved reduced First Amendment protection. *Dun & Bradstreet*, 472 U.S. at 762 (plurality).[57]

Even though Trans Union's lists do not embody all of the characteristics of core commercial speech outlined by the Court in Bolger, the lists concern private matters primarily concerning the economic interests of the speaker and its specific business audience. As such, we find that the best fit here is to grant Trans Union's lists the same degree of First Amendment protection accorded to commercial speech.[58] Consequently, we apply

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[57] Although Trans Union correctly notes that *Dun & Bradstreet*, unlike the instant matter, concerned the distribution of a false credit report that injured the reputation of the report's subject, the falsity of the credit report was only one of the several considerations that led the Court to conclude that its distribution was not entitled to full First Amendment protection. The fact that the consumer report was of limited distribution and, like advertising, was hardy and unlikely to be deterred by incidental state regulation supported this conclusion. *Id.* at 762.

[58] Our conclusion is supported by a recent ruling of the U.S. Court of Appeals for the Ninth Circuit in which the court held that a private party's sale of the names and addresses of arrestees was a "pure economic transaction" that constituted commercial speech entitled to intermediate First Amendment protection. *United Reporting Pub. Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), *rev'd on other grounds, Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 120 S. Ct. 483 (1999) (Court reversed facial

intermediate constitutional scrutiny to the FCRA's restriction of Trans Union's sale of its target marketing lists.[59]

2. The FCRA Passes Intermediate Constitutional Scrutiny

The *Central Hudson* case and its progeny set forth the analysis appropriate for intermediate level scrutiny in a First Amendment context. Under this test, a court must examine the following: (1) whether the expression at issue concerns lawful activity and is not misleading; (2) whether the asserted governmental interest supporting the restriction is substantial; (3) whether the regulation directly and materially advances the governmental interest asserted; and (4) whether the regulation is narrowly drawn to advance the government interest. *Central Hudson*, 447 U.S. at 566. Because it is undisputed that the expression at issue here concerns truthful, non-misleading factual information, we will focus our attention on the other three prongs of the *Central Hudson* test.

a. The Government Has a Substantial Interest in Protecting the Privacy of Consumers' Personal Credit Information

The FCRA and its legislative history indicate that the government's interest in restricting CRAs' dissemination of

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invalidation of the statute and did not reach the issue of whether the information constituted commercial speech); *see also Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994) (state statute restricting release, for commercial use, of criminal justice records containing personal information was subject to intermediate First Amendment scrutiny).

[59] Because the precise nature of Trans Union's lists was unclear, in an abundance of caution, the Commission formerly applied both the commercial speech and fully protected pure speech analysis when it first examined Trans Union's target marketing lists. *See In re: Trans Union*, 118 F.T.C. at 881-89. The Commission ruled that the FCRA did not violate the First Amendment under either standard. Our review of this matter is de novo and, based on our evaluation of a full record that was not previously before the Commission, we have determined that Trans Union's lists are not fully protected speech and thus we decline to apply strict constitutional scrutiny to the FCRA.

consumer reports is to protect consumers' privacy of their personal credit information. Congress expressly found that:

> "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a *respect for the consumer's right to privacy*."

15 U.S.C. § 1681(a)(4)(emphasis added). Congress based this finding on the record at the time of the Act's genesis, which demonstrated significant concerns in the area of consumer privacy. The record included, for instance, both media accounts as well as examples cited by Columbia University Professor Alan Westin regarding CRAs' disclosure of personal information for non-credit related purposes. (Reidenberg 961/22 -- 963/19).[60]

Senator Proxmire, in introducing the original legislation, stated that his bill "seeks to prevent an undue invasion of the individual's right to privacy in the collection and dissemination of credit information."[61] He also noted that "the consumer has . . . a right to see that the information is kept confidential and . . . he has a right to be free from unwarranted invasions of his personal privacy. The Fair Credit Reporting Act seeks to secure

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[60] During his testimony at Congressional hearings on the bill that became the FCRA, Professor Westin provided various examples of non-credit grantors easily obtaining consumer credit files. These examples include Professor Westin's own success in securing, without any credit-related purpose, a co-worker's consumer report as well as the ability of police agencies and federal investigators to obtain and use consumer reports in connection with non-credit related investigations. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, pp. 92-93 (1969) (testimony of Alan Westin).

[61] Statement of Senator Proxmire, Committee on Banking and Currency, Subcommittee on Financial Institutions, S. REP. No. 91-517 (November 5, 1969). Further, "[a] fourth problem is that the information in a person's credit file is not always kept strictly confidential." S. REP. No. 91-517, at 4 (1969).

these rights."[62] In light of these concerns, Congress drafted the Act to limit CRAs' disclosure of credit reports to people with a "permissible purpose."

Congressional interest in protecting consumers' privacy is further illustrated by the 1996 amendments to the FCRA, in which Congress added to the permissible purposes of consumer reports prescreening for certain defined firm offers of credit and insurance. The Committee Report to the amendments notes an effort "to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered."[63] In striking this balance, however, Congress ensured significant privacy protections for consumers, requiring that they receive notice that their personal credit information is being used for such purposes, and that they have the right to "opt out" of such use. *See* 15 U.S.C. §§ 1681b(c), (e) and 1681m(d)(1). Trans

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[62] *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 2 (1969) (statement of Senator Proxmire). In addition to the interest in protecting the confidentiality and privacy of personal credit information, the FCRA's legislative history also makes clear the importance -- to consumers and CRAs alike -- of the free flow of accurate and reliable consumer credit information between consumers and credit grantors. The Committee Report cites the "vital role" of CRAs in our economy and states that credit grantors have the right to the facts necessary to make sound decisions on whether to grant credit. S. REP. No. 91-517, at 2 (1969). The report also stresses that consumers have the right to correct erroneous information in their credit files. *Id.* Professor Westin also referenced the importance of accurate credit information, stating that CRAs exist to help credit grantors avoid loss through fraud or misuse of credit and to keep the costs of such losses from falling on the average consumer. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, p.91 (1969) (testimony of Alan Westin). Consumers benefit from strong credit markets, which in turn require accurate, current and reliable data.

[63] Economic Growth and Regulatory Paperwork Reduction Act of 1995 (12/14/95), S. REP. No. 104-185, at 36 (1995).

Union's practices at issue here do not provide for such safeguards.

Courts have also recognized that privacy protection of credit-related data is among the important purposes of the FCRA. The court of appeals in this matter found that "a major purpose of the Act is the privacy of a consumer's credit-related data." *Trans Union*, 81 F.3d at 234. *See also St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884 (5th Cir. 1989); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987); *Heath v. Credit Bureau of Sheridan Inc.*, 618 F.2d 693, 696 (10th Cir. 1980).

Although enacted congressional policy does not necessarily constitute substantial governmental interest for purposes of the *Central Hudson* analysis, *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1932 (1999), we are satisfied that the interest here is sufficient. First, the FCRA's legislative history is consistent with other congressional enactments related to personal privacy and the concerns raised by compilations of personal information in large databases. In *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-67 (1989), the Supreme Court reviewed in detail the terms and history of the Privacy Act, 5 U.S.C. § 552a, as well as the privacy exemptions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Court recognized, for example, that "the Privacy Act was passed largely out of concern over 'the impact of computer data banks on individual privacy.'" *Id.* at 766 (quoting H.R. REP. No. 93-1416, at p. 7 (1974)). Additionally, the Court concluded that the essence of the "privacy" interest Congress sought to protect under the FOIA was the individual's "control of information concerning his or her person," by deciding for him or herself the "degree of dissemination" of personal information. *Id.* Such Congressional consistency supports our conclusion that the government's interest is substantial.

Furthermore, case law indicates well-settled privacy interests in personal information generally,[64] and financial and credit information in particular. *See, e.g., Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir.) ("we recognize that public disclosure of financial information may be personally embarrassing and highly intrusive."), *cert. denied*, 464 U.S. 1017 (1983); *Millstone*, 528 F.2d at 833 (recognizing, in a FCRA case, that the right to privacy is "a significant personal right"). *But see U.S. West, Inc. v. Federal Communication Commission*, 182 F.3d 1224, 1228 (10th Cir. 1999) (vacating a Federal Communication Commission ("FCC") regulation on First Amendment grounds).[65]

. Trans Union argues that any privacy interest in the existence of a consumer's credit relationship is de minimis because only 1% of consumer files in CRONUS do not have a tradeline. TUAB 39 -- 40, 72. (Stockdale 906/1-8, 21-23, 904/15-18;

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[64] *See Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (for purposes of *Central Hudson* analysis, state has substantial interest in protecting privacy of potential clients of certified public accountants); *Whalen v. Roe*, 429 U.S. 589, 599 (1976) (although the Supreme Court upheld a statute authorizing New York state to record names and addresses of consumers receiving prescriptions for certain drugs, the Court acknowledged that individuals have a protectable "interest in avoiding disclosure of personal matters").

[65] *U.S. West* involved review of an FCC regulation implementing a section of the Telecommunications Act of 1996. The petitioner argued that the regulation violated the First Amendment by restricting its ability to engage in commercial speech with its customers. A majority of the panel applied a *Central Hudson* analysis and expressed "reservations" about whether the FCC had "asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information." *U.S. West*, 182 F.3d at 1235-36. The majority's skepticism was based upon its concern about the lack of evidence that carriers such as U.S. West would actually disclose the regulated information to outside parties and thereby breach consumers' privacy. The case before us is distinguishable from *U.S. West* as the facts here differ significantly. It is undisputed that Trans Union discloses consumer information to third party target marketers; indeed, the record demonstrates that Trans Union actively promotes the value of its lists to third party purchasers.

CX-358-G). This argument is not compelling. First, the mere fact that 99% of the consumer records in CRONUS have at least one tradeline is not indicative of whether there is a privacy interest worthy of FCRA protection.[66] Section 603(d) of the Act focuses on the nature of the information disclosed and not the amount of information worthy of protection. Second, Trans Union itself asserts that CRONUS data relate to a subset of people. The fact that this number is clearly less than the total number of adults in the United States, demonstrates just how effective tradeline information is in restricting to credit worthy individuals the pool of consumers eligible to be included in Trans Union's target marketing lists.

Also, we believe that Trans Union's argument ignores the full range of CRONUS information that Trans Union actually discloses or has disclosed about individuals. As discussed, Trans Union not only discloses information about the existence of a consumer's credit relationship, but also open dates, credit limits, number of tradelines, type of tradelines, among other information.

Finally, Trans Union asserts that consumers' routine disclosure of credit relationships, through the use of credit cards or mortgage applications that appear on the public record, demonstrates that consumers do not view credit relationships as private. TUAB at 73. The examples Trans Union cites, however, involve situations where the consumer knowingly relinquishes his or her privacy in return for a direct and known benefit that is also sought by the consumer. In those cases, the consumers were exercising their right to control the dissemination of their own personal information. *See Reporters Committee*, 489 U.S. at 763. By contrast, Trans Union's disclosure of consumers' personal credit information -- including the fact that a consumer has a

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[66] Moreover, as a practical matter, see supra p. 24, Trans Union's customers do not purchase lists of people with one tradeline.

recently used credit account that is not the subject of a credit dispute -- shares neither of these important attributes. In fact, such disclosures are made without the consumer's knowledge.

For all these reasons, we find that the government has a substantial interest in protecting the privacy of consumers' personal credit information, and we reject Trans Union's arguments to the contrary.

b. The Restriction Directly and Materially Advances the Government's Interest

The next question in the *Central Hudson* analysis is whether the FCRA's speech restriction directly and materially advances the government's interest. To meet this burden, the government may not rely on "mere speculation or conjecture" but must instead demonstrate that the restriction at issue will alleviate real harms to a "material degree." *Edenfield*, 507 U.S. at 770-71. The Supreme Court has struck down regulations of commercial speech where the government failed to offer sufficient evidence that the restriction at issue would advance its interests. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Edenfield*, 507 U.S. at 771 (no studies or anecdotal evidence presented); *see also Rubin*, 514 U.S. at 490 (1994) (government submits only "anecdotal evidence and educated guesses"); *cf. Edge Broadcasting*, 509 U.S. at 434 (upholding federal ban on lottery advertising based solely on "common sense judgment" that the ban would advance governmental interest in supporting the state's anti-gambling policies).

We rely upon substantial record evidence rather than mere conjecture or speculation to conclude that the FCRA, by limiting CRAs' disclosure of personal credit information, directly and materially advances the substantial government interest in protecting the privacy of personal credit information. Indeed, it is almost tautological -- because the unauthorized disclosure of personal credit information causes the privacy harm, restricting

the unauthorized disclosure of the information directly limits the infringement on privacy.

In attacking the FCRA, Trans Union argues that the statute is underinclusive because it elsewhere allows practices that undermine the consumer privacy interest in the information that Trans Union's target marketing lists communicate.[67] TUAB at 76-82. The court of appeals expressed an underinclusiveness concern as well, remarking on the apparent freedom of Trans Union's non-CRA competitors to gather and distribute the same information that Trans Union discloses in its marketing list business.[68]

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[67] Trans Union cites *United Reporting*, 146 F.3d at 1135, as an example of a statute struck down on First Amendment grounds. As noted, supra n.58, the Supreme Court recently reversed this decision. Furthermore, the FCRA is factually different. The statute at issue in *United Reporting* prohibited the release of arrest information for commercial purposes, but permitted it for "journalistic, scholarly, political, governmental, or investigative purposes." Prior to reversal, the Ninth Circuit had found that the governmental interest in protecting the privacy of arrestees was substantial but that the exceptions to the statute -- which include the right to broadly publish this information – precluded it from advancing the privacy interest in a direct and material way. Unlike the regulation at issue in *United Reporting*, however, in this case none of the FCRA's permissible purposes allows broad public disclosure of consumer report information.

[68] In particular, the court criticized the position that Trans Union could "separately obtain" and distribute consumer information – i.e., gather the information at issue from sources other than its credit reporting database – without violating the FCRA. Such a requirement, the court suggested, would result in a waste of time and resources. Although it did not rule on the issue, the court indicated that the "disparity" between Trans Union (as a CRA) and its competitors raised constitutional concerns. *Trans Union*, 81 F. 3d at 235. The court of appeals' concern presupposed that Trans Union, wholly independent of its status as a CRA, could gather for target marketing purposes the same type of rich consumer information that it gathers by way of its consumer reporting business. As explained infra, the record now before us clearly establishes that this is not the case; rather, the high quality and comprehensiveness of the underlying data in Trans Union's target marketing products stem from its special position as a CRA.

As a general rule, however, a regulation's underinclusiveness is fatal only where it is material, substantial or significant. *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 98-99 (2d Cir. 1998). The Supreme Court has offered the following guidance:

> "Nor do we require that the Government make progress on every front before it can make progress on any front . . . The Government may be said to advance its purpose by substantially reducing [the proscribed conduct], even where it is not wholly eradicated."

Edge Broadcasting, 509 U.S. at 434; *See also R.A.V.*, 505 U.S. at 387, *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995). Based on the full record developed on remand from the court of appeals, as well as the above-cited cases, we conclude that the FCRA's restrictions are not materially, substantially, or significantly underinclusive. Instead, we find that any disparity between Trans Union and its non-CRA competitors is reasonable given Trans Union's position as a CRA and the nature of the information it discloses in its target marketing products. In addition, neither the disclosure of information by credit grantors, nor the practice of prescreening, significantly undermines the Act's protection of privacy. Furthermore, the FCRA's restrictions on the dissemination of private, credit-related information are not, in fact, restricted to CRAs. Section 1681e(e) imposes restrictions on the resale by a CRA's customer of a credit report that are similar to the restrictions on the CRA itself. Therefore, the FCRA does substantially reduce the harm to consumers of intrusion on the privacy of their personal credit information.

(i) The FCRA Regulates the Activities of Trans Union and Other CRAs Because They Have Access to Vastly Superior Information

The fact that the FCRA applies to CRAs, but not to other target marketing or

data compilation companies, does not render the Act constitutionally infirm. As the record in this case demonstrates, CRAs are able to quickly obtain a broad array of current, accurate, detailed and highly personal credit information about consumers. Balancing this unique ability with safeguards against abuses, the FCRA requires that CRAs disclose such information only to persons with a permissible purpose as set forth in Section 604 of the Act. A comparison of Trans Union's operations to those of its non-CRA competitors demonstrates that Congress acted properly in treating CRAs differently than other information gatherers.

Trans Union's primary non-CRA competitors are Polk, Metromail, First Data, and ACXIOM. These companies obtain most of their data from state departments of motor vehicles ("DMVs"), census data, telephone directory white pages, county registrar and tax assessor records, self-reported surveys, and product registration or warranty cards. Polk, First Data, and Metromail's lists are compiled from two primary sources -- DMV data and white pages. (Cleary 3085/9-20, 3114/6-19; TU-119-3; Litz 2969/16 -- 2970/4; TU-115-p.158; Nusbaum 2880/8-12).

As a CRA, Trans Union's data sources are far superior and, as a result, the information it obtains through its credit reporting business has considerable advantages over the information of its non-CRA competitors. The quality of Trans Union's data is superior in terms of detail and accuracy as well as availability and comprehensiveness. Credit grantors and other information providers are responsible for providing CRAs with accurate, complete and up-to-date information and/or providing supplemental information to correct errors.[69] Because Trans Union obtains its information from third parties, its information is also less biased and thus more reliable than the self-reported information many non-CRA information brokers receive. Trans

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[69] Section 623 of the FCRA, 15 U.S.C. § 1681s-2.

Union's own credit scoring witness testified that data from CRAs are objective and better predictors of future credit performance than information provided by a consumer filling out an application. (Coffman 3806/2-14, 3857/24 -- 3858/4, 3858/17 – 3859/3; CX-122-P).[70] Finally, because Trans Union's information is reported and updated on an ongoing basis,[71] it is far more current than reports by for example, census bureaus and state DMVs.

By virtue of its status as a CRA, Trans Union also has the advantage of being able to provide an instant compilation of nearly all relevant information. Moreover, some of the more specialized information that Trans Union has access to and discloses in target marketing lists simply may not be available to other information brokers. Examples include the existence of 30/60/90 day finance trade; an upscale retail card; a student loan; a premium bank card; and the open dates of bank cards. (See e.g., TU-130-4; CCPF at 76; TU-117-2; TU-120-2; Schultea 3928/2-4; CX-310-D). Although other types of information that Trans Union discloses may be separately available from a range of sources, only CRAs have instant access to them all.

Recent legislation and case law have recognized and, indeed, expanded the disparity between Trans Union and its non-CRA competitors. As noted, Polk, Donnelly, and First Data use DMV data as a primary source of information and First Data also offers automobile data from state DMVs. However, the 1994 enactment of the Federal Drivers Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, generally restricts state DMVs from disclosing,

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[70] Trans Union's competitors' modeled products are not as "predictive" as Trans Union's own CRONUS-derived products. (Hinman 2270/13 -- 2271/11).

[71] Trans Union receives information regarding 1.8 billion tradelines per month. (Stockdale 908/1-19). Some customers report information on a daily basis to TU; the majority report on a monthly basis or according to their billing cycles. (Stockdale 904/8-14; Frank CX-186 at 19/3-7).

without the licensee's permission, personal identifying information contained in state DMV records. Reversing the holding of the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court in *Reno v. Condon*, 2000 WL 16317 (January 12, 2000), unanimously upheld the constitutionality of the DPPA. Thus, there is no question that the DPPA drastically limits the personal data that these information brokers can obtain.[72] n72 Moreover, the DPPA aside, information brokers have never been able to obtain driver data on a nationwide basis. By contrast, Trans Union's coverage provides continual access to current information on consumers' auto loans in all 50 states.[73]

Trans Union enjoys profound advantages with respect to other types of data as well. For instance, information brokers obtain consumer mortgage information from county records. (Litz 2972/6-9, 2975/5 -- 2976/7; M. Smith 3373/18-23, 3390/18 -- 3392/9; Nusbaum 2889/1-8, 2914/22 -- 2915/3, 2933/22 -- 2934/15; Cleary 3099/16-23; Hinman 2250/5-14). Such information gathering can be quite burdensome; in Texas alone, for example, information brokers may need to consult over 240 counties to fully cover the state's mortgages.[74] Trans Union has

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[72] The Court's holding in *Condon v. Reno*, that Congress may regulate the sale or release of personal identifying information, implicitly supports the notion that individuals have a right to personal data privacy. The same notion is presented here through our determination that the government, through the FCRA, has a substantial interest in protecting the privacy of consumers' personal credit information. See supra pp. 37-41.

[73] Trans Union understands its superiority as a source for consumer automobile data and has used this fact as a selling point. One of Trans Union's promotional letters notes that its coverage for automobile loan information encompasses all states and is not limited by the commercial restrictions that some states have imposed upon access to similar information. (CX-66-A).

[74] Mr. Kenneth Scott, witness for Trans Union, described the difficulty in obtaining such data, noting that information brokers send their employees with laptop computers to county courthouses to input public data and modem it to the front office. (Scott 2659/10-14).

the advantage of having national coverage of this information through its single database. This allows Trans Union to offer more current mortgage information than the public record information non-CRAs sell. It was therefore not surprising when Polk's Vice President for Operational Planning & Analysis conceded that Polk's consumer model assigns greater reliability weight to mortgage data coming from Trans Union, as compared to the data coming from county records. (Nusbaum 2888/2 -- 2890/13, 2927/6 -- 2928/11).[75]

Another source of information for Trans Union's non-CRA information broker competitors is from consumer surveys and warranty cards where consumers are obviously under no duty to provide accurate or complete information. As a CRA, however, Trans Union must "assure maximum possible accuracy" of all the information it gathers and disseminates. Section 607(b), 15 U.S.C. § 1681e(b). Trans Union has stated that self-reported data are "inevitably biased" (CX-115-Z-6) and has promoted its Master File as a unique source for individual-level observed behavior data -- "without equal" that is "based on actual behavior -- not self-reported or neighborhood values." (emphasis added) (CX-83-C).[76] Consumer surveys and warranty cards are also weak with respect to coverage. The record shows that 20-40 million consumers respond to surveys or provide warranty cards. (Nusbaum 2879/6-23; Cleary 3088/20 – 3089/6). By contrast, Trans Union provides information on over 140 million people. Additionally, several information brokers use census data to

[75] Even the legislative history reveals a concern that public information may not be as current as consumer reporting information. "Unfortunately, the [public record] information cannot always be kept up to date either because it is costly or because the correct information is simply not available." Report of the Committee on Banking and Currency, S. REP. 91-517, at 4 (1969).

[76] Elizabeth Dixon, Account Manager at Performance Data, and Patricia Porretto, Senior Account Executive at Performance Data, testified to the fact that the non-self-reported aspect of the Master File is a distinct advantage over other target marketers. (Dixon 292/16 -- 293/4; Porretto 1621/16-20).

estimate income. (CX-119-Z-7; Cleary 3123). These data are significantly less timely because they are only reported every ten years whereas Trans Union's income estimator, TIE, is updated every 7 days. (Wiermanski 1723/10-24; CX-120-B).

In light of the full record here, we find that Trans Union's status as a CRA allows it to collect a much wider array of consumer information that is richer, more detailed and more current than the information available to its non-CRA competitors. Trans Union could not obtain the same type and quality of information outside the scope of its consumer reporting business. Accordingly, we are not persuaded that the FCRA is unconstitutionally underinclusive because it treats CRAs and non-CRAs differently.[77]

Our conclusion is consistent with relevant case law. The Supreme Court has recognized the special threats to privacy that compilations of information pose, even though each constituent bit of information may be publicly available elsewhere. In *D.O.J. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), the court considered whether a privacy-related Freedom of Information Act exemption applied to a request for a "rap sheet" (a compiled database of publicly available information "bits"). The Court found:

> The issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there

[77] Trans Union also differs from other CRAs in terms of the type of information it discloses. Although Experian and Equifax disclose credit information to target marketers -- either directly or through third parties – they do so only on an aggregated, zip-plus-four basis. Such aggregated credit information relates to the typical consumer in a geographic area. By contrast, Trans Union's information concerns specific, identifiable individuals. Thus, it intrudes more acutely on individuals' privacy. In any event, the lawfulness of zip-plus-four aggregation is not an issue in this proceeding and we decline to rule on it here.

> is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764. The Court acknowledged the ". . . power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within."[78] *Id.* at 765.

(ii) Credit Grantors Do Not Disclose the Same Information As CRAs

To further support its underinclusiveness argument, Trans Union points to the "transactions or experiences" exception in Section 603(d)(2)(A)(i) and asserts that this provision undermines privacy protection under the Act because it allows credit grantors to disclose, for target marketing purposes, substantial information about their own customers.[79] We disagree. Trans Union introduced evidence demonstrating that Wachovia, First Card, Discover, First USA Bank, and American Express provide credit information on their credit card customers for target marketing. (Eulie 2376-78, 2381; Koppin 588-589;

[78] Trans Union argues that its witness, Kenneth Scott, testified that all of the selects available from Trans Union were also available from others in the marketplace. (Scott 2711 -- 2730). We are unpersuaded. In reaching his conclusion, we find that Mr. Scott performed only a superficial analysis. Mr. Scott examined only what is currently available - - not Trans Union's past practices. Importantly, Mr. Scott did not examine the difference in the source of the information for each select. Thus, he did not take into account that Trans Union, using CRONUS as its primary source of information, uniquely and instantly has a full range of richer and more comprehensive information available to it.

[79] Under this provision, information related solely "to transactions or experiences between the consumer and the person making the report" is not a consumer report. Section 603(d)(2)(A)(i) of the FCRA, 15 U.S.C. § 1681a.

Stormoen 3165-66; Scott 2614 -- 2622, 2628 -- 2630). The information available to a single credit grantor, however, is far more limited than Trans Union's CRONUS database, which compiles information from hundreds of creditors. Also, the record shows that credit grantors generally do not disclose particulars about credit accounts beyond the name and address of account holders. They do not, for example, disclose open dates or credit limits. (Pendleton 405/15-406/3; Koppin 588/6-589/6, 596/24-597/18; Stormoen 3165/3-3168/4; Eulie 2376/7-2377/23, 2380/4-10). Further, the ability of creditors and other merchants to collect customer information and disclose it may be limited by state law. New Jersey, Pennsylvania and Massachusetts, for example, prohibit merchants from collecting personal identification information that is not required for the transaction.[80] Other states prohibit the disclosure of information by merchants and financial institutions.[81] Because it is a CRA, Trans Union is not subject to these restrictions.

Trans Union also cites the National Marketing File ("NMF") created by Business Development Inc. - - a target marketing list provider - - as additional evidence that the FCRA's "credit grantor" exception can be used to intrude upon a consumer's financial privacy. This argument fails because NMF information is far less complete, detailed or timely than the data in

[80] See, N.J. STAT. ANN. § 56:11-17; PA. STAT. ANN. tit. 69, § 2602; MASS. ANN. LAWS ch. 93, § 105.

[81] California and Virginia prohibit credit card issuers and merchants respectively from selling personal information to third parties without notifying the individual and providing him/her with the ability to opt out; New Jersey prohibits the disclosure of electronic fund transfer transactions for marketing purposes without consent. See CAL. CIV. CODE § 1748.12; N.J. STAT. ANN. § 17:16K-3; VA. CODE ANN. § 59.1-442. Connecticut prohibits financial institutions from selling the names of card holders or disclosing financial records without written consent. See CONN. GEN. STAT. Ann. § 42-133gg; CONN. GEN. STAT. § 36a-42 (1997).

CRONUS.[82]

Similarly, the existence of cooperatives that share data and reveal consumer credit information also fails to support Trans Union's underinclusiveness argument. One such cooperative, Abacus, collects information regarding consumers' mail order buying behavior from 700 catalogers and shares the information among its members. Abacus discloses how many credit transactions a consumer has had over his/her lifetime, how much money a consumer has spent using credit cards over the last 12 months, and other information about a person's history of buying by credit card. (TU-206). Like NMF's information, however, this type of data also does not share the same level of comprehensiveness as the Trans Union information. Moreover, several of the state laws previously described may limit the disclosure of personal credit information to such cooperatives.[83]

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[82] The NMF discloses two types of information in two "fields": (1) a counter field that shows the number of credit cards a consumer has up to nine, and (2) a bank card field that indicates whether there is one bank card or not. (Schultea 3911/3-3913/7, 3943/6-23). The NMF is not kept current and a record is deleted only when the person moves or dies. (Schultea 3912/4-12, 3918/24 -- 3919/7, 3920/2-11). The NMF does not reveal whether the person has obtained or used credit within a specified time period; instead, it reveals only whether a consumer has ever had a bank card and how many, up to nine, accounts the consumer has ever had. Mr. Schultea, President of Business Development, testified that in all likelihood, the NMF contains references to credit card accounts that have been closed and/or are currently inactive. (Schultea 3922/3-14). The NMF also does not indicate open dates of any of the accounts, or the type of credit a consumer has obtained (other than the existence of a bank card). (TU-130 p. 4; TU-117 p. 2; TU-120 p. 2; Schultea 3928/2-4; CX-310-D). Finally, as for coverage, the information in the NMF comes from only 20-25 retail companies and bank clients with credit card customers. (Schultea 915/2-3916/21).

[83] We understand that substantial development of broad-based information-sharing agreements, in the presence of an ever-growing electronic information-handling medium, may advance the quality of information that such cooperatives offer. It is possible that over time, the disparity between CRAs and non-CRAs may narrow. If so, Congress may find it appropriate to

(iii) Prescreening

Finally, Trans Union argues that the FCRA is underinclusive because the Act, as amended in 1996, allows the practice of prescreening for so-called "firm offers" of credit and insurance. We find that Congress' decision to allow prescreening does not constitutionally undermine the FCRA. Any privacy intrusions that result from prescreening are significantly less harmful than the privacy intrusion at issue in Trans Union's target marketing business. In prescreening, the types of consumer report information that can be used are restricted - - Section 604(c)(2) - - and prescreening itself may provide a concrete benefit to consumers, i.e., a "firm offer of credit," that they might not otherwise have. Equally important is the FCRA's requirement that those seeking to use the prescreening mechanisms notify consumers that they may opt-out of future, prescreened solicitations. 15 U.S.C. §§ 1681b(c) and 1681m(d).

While a central concern of legislators at the time the FCRA was enacted was to protect the privacy of consumers' personal credit information, a related concern was to limit the disclosure of consumers' credit information. This latter concern and the means to address it were raised throughout the 1969 legislative hearings. Senator Proxmire, in introducing the original legislation, noted that "the consumer has . . . a right to see that the information [is] . . . used for the purposes for which it is collected . . ."[84] Professor Alan Westin also testified that "the

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respond to new threats to financial privacy with new legislation as they arise. Cf. Gramm-Leach-Bliley Act of 1999, Pub. L. 106-102 (limiting, inter alia, disclosure of nonpublic personal information to nonaffiliates). But that does not change the legal obligations the Act imposes upon CRAs like Trans Union as a result of their unique status and the benefits they receive. At this time, the range and detail of information provided by CRAs far surpasses that of other information brokers and supports the legislative scheme.

[84] Statement of Senator Proxmire, *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on*

central issue of privacy is the release of personal credit information to other than credit grantors."[85] Even a representative from the credit reporting industry testified that information gathered specifically for credit-granting purposes should not be made available for other purposes.[86]

Congress's approach to prescreening, in particular its requirement of notice and opt out rights for the consumer, is consistent with the twin goals of protecting the privacy of consumers' personal credit information and ensuring that consumer credit information not be used for inappropriate purposes. Permitting the disclosure of certain consumer credit information for prescreening, as tailored by statutory limitations, does not undermine the FCRA.

Consequently we find that the FCRA is not underinclusive. Congress recognized that CRAs like Trans Union, by virtue of their credit reporting business, are uniquely positioned to obtain the most up to date, detailed and comprehensive set of personal credit information on an individual, observed basis. Mishandling such information poses a special threat to consumer privacy. Therefore, by limiting the disclosure of this information, the FCRA directly and materially advances the government's interest

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Banking and Currency, 91st Cong. 92 (1969). He also stated that "[a] second aspect to the problem of confidentiality is the use of information inconsistent with the purposes indicated when the information was collected." 115 CONG. REC. S2340, 2410-16 (1969).

[85] *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, at 92 (1969) (testimony of Alan Westin).

[86] *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 224, 228 (1969) (statement of Harry C. Jordan, Chairman of the Board, Credit Data Corp., "[Credit Data's] rules can be stated as follows: . . . Credit information is available to credit grantors only for credit purposes . . . Credit Data, as a matter of policy sells information only to credit grantors.").

in protecting the privacy of personal credit-related information. To find otherwise would allow Trans Union to have it both ways - - i.e., to enjoy unique access to the widest array of the best consumer credit information available, without following the restrictions Congress imposed in order to protect consumer privacy. Further, the fact that the FCRA allows credit grantors to disclose limited information and permits prescreening does not make the Act underinclusive.

c. The Restriction Is Narrowly Tailored

The final prong of the Central Hudson test requires a reasonable fit between the goals of the statute and the statute itself. The proper fit "is not necessarily perfect, but reasonable"; it must "represent[] not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). With these words in mind, it is appropriate to consider whether there are alternative means of accomplishing the government's stated interest with a lesser intrusion into speech. In doing so, we recognize that a commercial speech restriction may be unconstitutional if there is a "far less restrictive" alternative. *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999).

We believe that the FCRA's restriction on the disclosure of consumer reports, including Trans Union's target marketing lists, is narrowly tailored to protect the privacy of consumers' personal credit and other financial information. Moreover, we do not believe that alternative restrictions proposed by Trans Union are "far less restrictive," nor would they afford sufficient privacy protection.

Congress established a three-tiered system for disclosure and privacy protection:[87]

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[87] Congress has used a "tiered" privacy-protecting approach in other areas

* No Consumer Permission Required. Where a consumer has initiated a transaction involving credit, employment, or insurance, for example, CRAs may provide a consumer report for purposes of that specific transaction without the consumer's permission.

* Notice and Opt Out. Where a consumer has not initiated such a transaction, but where a creditor or insurance company seeks to make a "firm offer of credit or insurance" (i.e., prescreening), a CRA may provide certain consumer report information as long as the consumer is provided notice that his or her name was provided by a CRA and the opportunity to opt out of appearing on such lists in the future, i.e., notice and opt out rights.

* Opt In. Where a consumer has not initiated a transaction, and where the purpose of the credit report is not for a permissible purpose under the Act, a consumer report may only be disclosed with a consumer's express consent, i.e., an "opt in" system.

This three-tier scheme is sufficiently tailored to achieve Congress's goal. Congress's determination that consumers would not be adequately protected from privacy intrusions by target marketers through a "notice and opt out" system is reasonable. Specifically, Congress's decision to favor the more privacy protective "opt in" is a sound system in light of documented problems of credit reports being widely disclosed for purposes unrelated to credit.

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as well. In the Cable Communications Policy Act of 1984, 47 U.S.C. § 551, the Electronic Communications Privacy Act of 1986, 47 U.S.C. § 222(c), and the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710, Congress afforded different levels of privacy protection – from disclosure without consumer's permission, to notice and opt out, to opt in – as the uses of such information become less related to the purposes for which the information was collected.

Trans Union contends that a simple opt out procedure would adequately protect consumer privacy without compromising Trans Union's speech. TUAB at 82-85. However, this proposal is untenable and is based upon a misstatement of the Equifax/Harris findings. According to Trans Union, the 1996 Equifax/Harris survey revealed that 80% of consumers surveyed who object to the use of credit reporting information, change their minds when they are told of the right to opt out. (TU-88; Beales 3656 -- 3665). Those survey findings, however, examined consumer attitudes about the use of credit reporting information to provide pre-approved offers of automobile insurance or life insurance. The survey did not examine consumer attitudes toward the use of such information for target marketing (at issue here).[88]

Additionally, to the extent that Trans Union contends that opt out rights alone would adequately protect consumers in the target marketing context, Trans Union ignores the fact that, in the prescreening context, Congress authorized a notice and opt out system. The notice segment of the system is essential because it provides consumers the information to allow them to exercise opt out rights.[89]

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[88] Survey evidence introduced by Complaint Counsel indicates that consumers view credit relationships as private and that they experience a privacy invasion from the disclosure of the existence of types of credit accounts. (See CX-274; Mazis 1109/20-25). The survey, conducted by Dr. Michael Mazis, assessed the attitudes of 1,002 consumers regarding the use of information derived from CRONUS and from credit reports to compile marketing lists. (Mazis 1080/10-18; CX-354-A; Waldeck 1060/12-16). A total of 68.1% of the respondents found the use of credit report information for the compilation of marketing lists to be unacceptable. (Mazis 1105/13-20; CX-354-B). Based on these results, Complaint Counsel's expert opined that consumers have a strong privacy interest in the use of information from their credit reports. (Mazis 1107/23-25).

[89] Indeed, although the Direct Marketing Association offers consumers the right to opt out of appearing on its members' marketing lists, most consumers are unaware that they can opt out of such lists. (Beales 3669/13 -- 3670/10;

Further, Trans Union argues that S. 650, 104th Cong. (1995) (a bill that was not enacted) could serve as a less restrictive alternative to the FCRA. (TU-214). Before a less restrictive alternative can be considered, however, it is necessary to determine whether the alternate approach furthers the government's interest to the same extent as the FCRA. Because S. 650 would have provided considerably less data privacy,[90] we cannot conclude that Congress acted unreasonably or disproportionately in the balance it struck between consumer privacy and commercial speech. Accordingly, the question of whether S. 650 would have had less of an impact on speech than the FCRA is irrelevant.

Based on this analysis, it is evident that the FCRA's restriction on Trans Union's target marketing lists is sufficiently narrowly tailored to achieve the goal of protecting the privacy of consumers' personal credit information. We therefore conclude that the provisions of the FCRA at issue here do not violate the First Amendment.

* * *

VII. CONCLUSION

Based on the foregoing, as well as the thorough and substantial record in this case, we find that Trans Union violated

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Westin 3639/8-19; TU-88-2-58). It is also significant that, when faced with a question at oral argument about whether Trans Union would agree to a notice and opt out system in the target marketing area, counsel for Trans Union evinced a strong reluctance to do so unless non-CRA competitors were similarly asked to abide by a notice and opt out system. (Oral Arg. 54/3-7). Trans Union's pursuit of equal treatment vis-a-vis non-CRA competitors is again based on its failure to recognize the special privacy concerns that CRAs' databases create.

[90] S. 650 would have permitted CRAs to sell target marketing lists that disclosed a wide variety of information, including information that is used in credit eligibility decisions and that bears on consumers' credit worthiness, such as number of tradelines, open dates of loans, and types of tradelines.

Sections 604 and 607(a) of the FCRA because its target marketing lists are "consumer reports" that were disclosed without a "permissible purpose." We also find that the FCRA, as applied in this case, passes constitutional muster.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent Trans Union Corporation from the Initial Decision and Order on remand, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to adopt the Administrative Law Judge's findings and conclusions to the extent that they are consistent with those set forth in the accompanying Opinion.

Accordingly, the Commission enters the following order:

IT IS HEREBY ORDERED that, consistent with the terms of this opinion, respondent Trans Union Corporation, and its successors and assigns:

a) Cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists, to any person unless respondent has reason to believe that such person intends to use the consumer report for purposes authorized under Section 604 of the FCRA.

b) Maintain for at least five (5) years from the date of service of this Order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this Order.

c) Deliver a copy of this Order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this Order.

d) For the five (5) year period following the entry of this Order,

notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, sale or change in control resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this Order.

e) Within one hundred and eighty (180) days of service of this Order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this Order as of that date.

APPENDIX E (RELEVANT EXCERPTS)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9255

In The Matter of Trans Union Corporation

INITIAL DECISION

July 31, 1998

James P. Timony, Administrative Law Judge

I. INTRODUCTION

The complaint, filed on December 15, 1992, alleges that Trans Union's sale of target marketing lists, with consumer information from its credit reporting files, was the sale of consumer reports to persons who did not have a permissible purpose to receive them, in violation of the FCRA, 15 U.S.C. § 1681.[1] Administrative Law Judge Parker entered summary decision on September 20, 1993, upholding the complaint.

Trans Union appealed to the Commission, which upheld Judge Parker on September 28, 1994.[2] On appeal, the United States Court of Appeals for the District of Columbia Circuit held that there was a genuine issue of material fact and that summary decision was inappropriate and remanded the case to the

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[1] 116 F.T.C. 1334 (1993). The original complaint in this matter also alleged violations of the FCRA by Respondent in connection with its prescreening activities. Those allegations were settled by consent agreement on November 18, 1993. *Id.* at 1357-61. Respondent's prescreening is not, therefore, at issue.

[2] 118 F.T.C. 821 at 838-95 (1994).

Commission. *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996).

By Commission Order of July 9, 1996, the matter was remanded for trial. I was assigned to preside on December 22, 1997. The trial commenced on February 17, 1998. The transcript is 3962 pages. About 500 exhibits were received. The record closed on March 27, 1998.[3]

* * *

Complaint counsel argue that PerformanceData lists are a product, not speech, and are not protected by the First Amendment. But the lists are part of commercial transactions, providing "information of import to significant issues" serving as a vital part of the process to "inform the public of the availability, nature, and prices of products and services," and performing "an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

Target marketing lists are the means by which direct and telemarketers tell consumers about their business. Information on home sales and mortgages are found in these lists (Tr. 2657-59), as is information on automobile ownership, F 38, bank cards, F 44, department store cards, F 52, finance loans, F 55, mail order buyers, F 71, student loans, F 10, and upscale retail credit cards, F 74. Target marketing lists are as much a part of the process of speech as loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); public sidewalks, *United States v. Grace*, 461 U.S. 171 (1983); or free standing newsracks used to distribute free magazines, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Target marketing lists involve information taken from the database gathered and used in the sale of credit reports. They

[3] Judge Parker ruled that the time limits required by recent amendment were impossible in this case. Order of September 30, 1996.

constitute commercial speech.[193]

* * *

[193] PerformanceData has provided a list to a wholesaler whose client was the National Republican Committee, which used the list to solicit consumers to make campaign contributions (CX 22; Tr. 308-09); the predominant use of the lists, however, is for commercial purposes. TU 171-73, TU 175; TU. 307-08, TU-315-19, TU-1317-21.

APPENDIX F (RELEVANT EXCERPTS)

15 U.S.C. § 1681a

(d) Consumer report.

(1) In general. The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 604.

(2) Exclusions. The term "consumer report" does not include--

(A) any--

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the

consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 615; or

(D) a communication described in subsection (o).

* * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * *

15 U.S.C. §1681b

§ 1681b. Permissible purposes of consumer reports

(a) In general. Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the

information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that--

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 454 of the Social Security Act (42 U.S.C. 654) for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes.

(1) Certification from user. A consumer reporting agency may

furnish a consumer report for employment purposes only if--

(A) the person who obtains such report from the agency certifies to the agency that--

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title, as prescribed by the Federal Trade Commission under section 609(c)(3).

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other

similar means. If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application--

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3); and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report,

the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 609(c)(3).

(B) Application by mail, telephone, computer, or other similar means.

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 615(a), within 3 business days of taking such action, an oral, written or electronic notification–

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific

reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 609(c)(3).

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

* * *

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer.

(1) In general. A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if--

(A) the consumer authorizes the agency to provide such report to such person; or

(B)

(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e); and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(b). A person may receive pursuant to paragraph (1)(B) only--

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries. Except as provided in section 609(a)(5), a consumer reporting agency shall not furnish

to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) [Reserved]

(e) Election of consumer to be excluded from lists.

(1) In general. A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification. A consumer shall notify a consumer reporting agency under paragraph (1)--

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system. Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall--

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election. An election of a consumer under paragraph (1)--

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency--

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

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